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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 286

THE NEW YORK CENTRAL RAILROAD COMPANY, AS OWNER OF THE CARFLOAT "No. 37", PETITIONER,

vs.

TUG "TALISMAN", THE LONG ISLAND RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,983)

(36,983)

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK CENTRAL RAILROAD COMPANY, as Owner of the Carfloat "No. 37", Libellant-Appellee,

vs.

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY, Claimant-Appellant

STATEMENT

1928.

June 27. Filed libel and stipulation for costs.
July 25. Filed claim and stipulation for costs and value.
Aug. 11. Filed order amending libel (paragraph No. 6). Goddard, J.
Sept. 12. Filed answer of Long Island Railroad Company.
" 15. Filed note of issue and notice of trial—Oct.

1929.

Dec. 20. Filed order substituting Burlingham, Veeder, Fearey, Clark & Hupper.

1931.

Mar. 12. Before Knox, J.—case called—to be submitted to the Court on an agreed statement of facts.
" 28. Filed stipulation of facts.

[fol. 2]

June 30. Filed opinion—Decree for libellant, Knox, J.
July 21. Filed interlocutory decree with reference to Anthony V. Lynch—Knox, J.
" 24. Filed notice of appeal.
" 25. Filed petition and order allowing appeal. Patterson, J.
" 25. Filed assignment of errors.

IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Libel of The New York Central Railroad Company, as owner of carfloat "No. 37" against the tug "Talisman",

her engines, boilers, etc., in a cause of collision, civil and maritime, alleges on information and belief, as follows:

First. Your libellant is and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business located at No. 6 Beaver Street, in the Borough of Manhattan, City, County and State of New York, and the owner of the carfloat "No. 37", which up to the time of the occurrence hereinafter described was tight, staunch, strong and in all respects seaworthy and properly manned and equipped.

[fol. 3] Second. The tug "Talisman" is now and will be during the pendency of process hereunder within this District and within the jurisdiction of the United States and of this Honorable Court.

Third. On the 29th day of October, 1926, the New York Central carfloat "No. 37" lay moored in bridge No. 6 at the Long Island Railroad Terminal, Long Island City, light. At about 1:35 A. M. on said 29th day of October, 1926, the Long Island Railroad Tug "Talisman" in shifting N. Y. C. float "No. 58" into bridge No. 5 so negligently and so carelessly executed the manœuver as to come into contact with the said N. Y. C. carfloat "No. 37", which contact resulted in damage to the said N. Y. C. carfloat "No. 37".

Fourth. The aforesaid collision and resulting damage were not caused through any fault, neglect and want of care on the part of this libellant or the carfloat "No. 37", or those in charge of her, but were caused solely through the fault, neglect and want of care on the part of the tug "Talisman" and/or those in charge of her, in the following respects, among others, which will be pointed out at the trial of this action:

1. In that those in charge of the tug "Talisman" were careless and inattentive to their duties.

2. In that they failed to maintain a good and sufficient lookout.

[fol. 4] 3. In that they negligently and carelessly caused a contact with the N. Y. C. carfloat "No. 37".

4. In that they failed to exercise any or ordinary precautions to prevent the contact.

5. In that they did nothing to avoid the collision.

Fifth. By reason of the premises herein alleged libellant has sustained damages as nearly as the same can now be estimated in the sum of $2,250.00, no part of which has been paid although duly demanded.

Wherefore libellant prays that process in due form of law, according to the course and practice of this honorable Court in causes of Admiralty and Maritime jurisdiction, issue against the said tug "Talisman", her engines, boilers, etc., and that all persons having or claiming any interest therein be cited to appear and answer all and singular the matters aforesaid; that this honorable Court be pleased to decree to your libellant its damages, with interest and costs, and that the tug "Talisman", her engines, etc., be condemned and sold to satisfy the same, and that your libellant may have such other and further relief as in law and justice it may be entitled to receive.

Bingham, Englar & Jones, Proctors for Libellant.
Office & P. O. address: No. 64 Wall Street, New York City.

[fol. 5] *Duly sworn to by F. N. Melius. Jurat omitted in printing.*

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING LIBEL—Aug. 11, 1928

Upon the annexed consent and on motion of Bingham, Englar & Jones, proctors for libellant, it is hereby

Ordered that the libel filed herein on the 27th day of June, 1928, be, and the same hereby is, amended so as to add thereto a paragraph numbered "Sixth" as follows, to be inserted immediately before the Wherefore Clause of said libel:

[fol. 7] Sixth. All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Henry W. Goddard, U. S. D. J.

We hereby consent to the entry of the foregoing order. Dated New York, August 10, 1928.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant.

[fol. 8] In United States District Court

Answer

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of The Long Island Railroad Company, owner and claimant of steamtug Talisman, as proceeded against upon the amended libel of The New York Central Railroad Company, in a cause of collision, civil and maritime, alleges:

First. Claimant denies that it has any knowledge or information sufficient to form a belief as to the allegations of the first article of the amended libel.

Second. Claimant admits the allegations of the second article of the amended libel.

Third. Claimant admits that on October 29, 1926, carfloat New York Central No. 37 was lying in No. 6 bridge, Long Island City; that about 1:35 A. M. the Talisman brought float No. 58 into collision with No. 37. Claimant denies the other allegations of the third article of the amended libel.

Fourth. Claimant denies the allegations of the fourth article of the amended libel.

Fifth. Claimant admits demand and non-payment and denies the other allegations of the fifth article of the amended libel.

[fol. 9] Sixth. Claimant admits the Admiralty and Maritime jurisdiction of the United States and of this Honor-

able Court, and denies the other allegation of the sixth article of the amended libel.

Seventh. Further answering, claimant alleges that the facts are as follows:

About 1.35 A. M. on October 29, 1926, the Talisman had float New York Central No. 58 in tow on her starboard side, and was engaged in shifting No. 58 into No. 6 bridge, Long Island City. The Cutchogue was lying on the end of Deck 3. Carfloat New York Central No. 37 was lying light in No. 6 bridge. Weather was clear, tide flood, wind S. W. In attempting to keep clear of the Cutchogue, the Talisman brought the starboard forward corner of No. 58 into collision with No. 37.

Eighth. The collision and consequent damage were not caused or contributed to by any fault or negligence on the part of the Talisman or those in charge of her, but were due solely to the negligence of carfloat New York Central No. 37, in the following respects among others:

1. No. 37 was unseaworthy.

2. No. 37 was old and weak and not fit to withstand reasonable contact to be expected in harbor navigation.

3. No. 37 was not in a proper berth.

[fol. 10] 4. No. 37 was not in charge of a competent person.

Ninth. Further answering, claimant alleges that on or about July 31, 1920, claimant by registered letter notified libellant that on and after September 1, 1920, it would cease to be responsible for vessels lying at its terminals, Long Island City, and Bay Ridge, Brooklyn, and that all floating equipment at these terminals, particularly carfloats, would be at the risk of the vessel, float or craft, and that claimant would not be responsible for any damage received by said floating equipment whether the damage arose through the negligence of it or its employees or through other causes, and that the notice applied to all floats, whether in charge of a floatman or not, while moored at its terminals at Long Island City or Bay Ridge, Brooklyn. No reply to this communication has ever been received by respondent from libellant.

At the time of the collision herein alleged between float New York Central No. 58 and float New York Central No. 37, the latter float was lying at claimant's terminal at Long Island City under the terms of the above mentioned letter, and she was there at her own risk, and claimant accordingly is not liable for any damage sustained by No. 37.

All and singular the premises are true.

Wherefore claimant prays that the amended libel herein may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant. W. Y. Cherry.

[fol.11] *Duly sworn to by W. Y. Cherry. Jurat omitted in printing.*

[fol. 12] In United States District Court

[Title omitted]

Stipulation of Facts

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, as follows:

1. That the collision referred to in the libel and answer herein between New York Central carfloat No. 58 in tow of the Long Island Railroad Company tug Talisman and New York Central carfloat No. 37 which was lying moored in bridge No. 6 of the Long Island Railroad Terminal at Long Island City was occasioned solely by reason of the negligence of the said tug Talisman and/or those in charge of her.

2. That the libellant sustained damages as a result of the said collision, the nature and amount of the damages to be determined at a reference in the event of a decision in favor of the libellant.

3. That both the libellant New York Central Railroad Company and the claimant Long Island Railroad Company, [fol. 13] owner of the tug Talisman are and at the time of this accident were common carriers engaged in interstate commerce. The claimant Long Island Railroad Company

received said carfloat No. 37 at said claimant's terminal at Long Island City in connection with transportation in interstate commerce of freight cars and freight.

4. That the allegations contained in Article First of the libel herein are admitted by the claimant.

5. That libellant duly received by registered mail from claimant the notice dated July 31, 1920, referred to in Article Ninth of the answer herein and that libellant made no reply thereto. Said notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage [fol. 14] received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Yours very truly, H. L. Des Anges, Marine Superintendent.

Dated New York, March 27, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK CENTRAL RAILROAD COMPANY, Libellant,

against

Steamtug TALISMAN, LONG ISLAND RAILROAD COMPANY, Claimant

Appearances:

Messrs. Bigham, Englar, Jones & Houston (Leonard J. Matteson and Charles A. Van Hagen, Jr., of Counsel), Proctors for Libellant;

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper (Chauncey I. Clark and Paul Tison, of Counsel), Proctors for Claimant.

OPINION, KNOX, D. J.

KNOX, D. J.:

The facts in this case are very simple. On October 29, 1926, libellant's carfloat No. 37 lay moored in Bridge No. 6 at claimant's Long Island City Terminal. It was there in connection with transportation of freight in interstate commerce. Claimant's tug Talisman in shifting another carfloat brought it into collision with No. 37, with resultant in-[fol. 16] jury to the latter. It is stipulated that the collision was occasioned solely by the negligence of the Talisman. It is also stipulated that upon an unspecified date libellant duly received from claimant a notice dated July 31, 1920, which reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Libellant never replied to the notice and the question before the Court is whether claimant, in seeking to avoid liability for its own negligence, has successfully done so. [fol. 17] This point was presented to the City Court of the City of New York in the case of The Patchogue, 1926 A. M. C. 45, and it was there held that the defendant, Long Island Railroad Company, could not exempt itself from liability by merely sending out such a notice. The Court said, at page 48:

"The plaintiff in the instant case could not go to any float terminal which it might select. It was obligated to go to the specific terminal belonging to the defendant Long Island Railroad Company. Under such circumstances the law wisely dictates to defendant that it legally cannot exempt itself from liability in damages, since plaintiff required a service from it as a carrier which no other party could furnish. Unlike to towage cases, there was no freedom of contract. Plaintiff, willy-nilly in the instant case, had to deal with defendant at its terminal. Defendant was acting as a common carrier pure and simple, in the service rendered to floats with freight cars."

While this decision is not binding here, it is very apt, and is entitled to respectful consideration, notwithstanding the cases of The Cutchogue, 10 Fed. (2d) 671, and Ten Eyck v. Director General of Railroads, 267 Fed. 974, upon which claimant strongly relies. The last mentioned decision holds that the owners of the tugs there concerned had relieved themselves from liability for negligence by having sent out notices to the effect that towage contracts to be performed by the tugs should be executed at the risk of the tows. The [fol. 18] theory was that the receipt of such notices by the

owners of the vessels to be towed, and their apparent acquiescence therein, resulted in the inclusion of the limitation of the tug's liability in the contracts between the parties. It is my opinion that this line of decisions does not rule the instant case. In the towage cases, there was no compulsion on the part of the towed vessels to accept the terms offered them, and a tug, with respect to its tow, is not a common carrier. Here, however, the situation is altogether different. Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic. Furthermore, claimant was under an obligation to receive such freight as might be delivered to the terminal by libellant; and, during such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant. A mere ipse dixit to the contrary in an effort by claimant to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic to another carrier should not be permitted to serve that purpose, and libellant may have a decree.

John C. Knox, U. S. D. J.

Dated New York, N. Y., June 30, 1931.

[fol. 19] In United States District Court

The New York Central Railroad Company, as Owner of the Carfloat "No. 37", Libellant,

against

Tug "Talisman", Long Island Railroad Company, Claimant

Interlocutory Decree—July 17, 1931

This cause having duly come on for trial and having been heard on the pleadings and proofs of the respective parties,

and having been submitted by the advocates for the respective parties, and due deliberation having been had thereon, and the Court having rendered its decision in writing holding the tug "Talisman" solely at fault, it is

[fol. 20] Now, on motion of Bigham, Englar, Jones & Houston, proctors for the libellant herein,

Ordered, adjudged, and decreed that the libellant, The New York Central Railroad Company, as owner of the carfloat "No. 37", recover of and from the steamtug "Talisman", her engines, boilers, etc., her claimant and stipulators for costs and value its damages sustained by reason of the matters and things set forth in the libel herein with interest and costs, and that the said vessel be condemned therefor, and it is further

Ordered that it be referred to Anthony V. Lynch, Esq., Commissioner, to ascertain and compute the amount of the libellant's damages and to report thereon to this Court with all convenient speed.

John C. Knox, U. S. D. J.

[fol. 21] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the claimant, The Long Island Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the interlocutory decree entered in the above entitled cause in the office of the Clerk of this Court on the 21st day of July, 1931, and from each and every part thereof.

Dated New York, N. Y., July 23, 1931.

Yours, etc., Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 22] To Charles Weiser, Esq., Clerk of the United States District Court, Southern District of New York; Messrs. Bigham, Englar, Jones & Houston, Proctors for Libellant, 64 Wall Street, New York, N. Y.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Claimant, The Long Island Railroad Company, being aggrieved by the decision of the United States District Court for the Southern District of New York filed herein, and by [fol. 23] the interlocutory decree entered thereon in the office of the Clerk of this Court on the 21st day of July, 1931, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., July 23, 1931.

The Long Island Railroad Company, by Burlingham, Veeder, Fearey, Clark & Hupper, Proctors, by Chauncey I. Clark.

IN UNITED STATES DISTRICT COURT

ALLOWANCE OF APPEAL

Upon the foregoing petition, it is

Ordered that the appeal herein prayed for by claimant, The Long Island Railroad Company, be and the same hereby is allowed.

Dated New York, N. Y., July 24, 1931.

Robert P. Patterson, U. S. D. J.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

The claimant, The Long Island Railroad Company, appellant herein hereby assigns error in the opinion, findings and decree of the District Court of the United States for the Southern District of New York as follows:

1. In that the Court held claimant liable for damages sustained by libellant's carfloat No. 37.

2. In that the Court held that there was no contract relieving claimant from liability for negligence.

3. In that the Court held that claimant's letter of July 31, 1920, was a "mere ipse dixit".

4. In that the Court held that claimant's letter of July 31, 1920, was "an effort by claimant to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic to another carrier".

[fol. 25] 5. In that the Court held that the line of decisions including The Cutchogue, 10 Fed. (2) 671 and Ten Eyck v. Director General of Railroads, 267 Fed. 974, did not rule the instant case.

6. In that the Court held that the situation in the instant case was altogether different from the situation in The Cutchogue, supra, and Ten Eyck v. Director General of Railroads, supra.

7. In that the Court held that libellant had no freedom of contract because it was bound to send its float to claimant's terminal and claimant was bound to receive it.

8. In that the Court failed to hold that a contract existed between libellant and claimant relieving claimant from liability for negligence.

9. In that the Court failed to hold that claimant's letter of July 31, 1920, constitued a contract binding on the parties.

10. In that the Court failed to hold that The Cutchogue, supra, and Ten Eyck v. Director General of Railroads, supra, ruled the instant case.

11. In that the Court failed to follow the ruling of this Court in The Cutchogue, supra, and Ten Eyck v. Director of Railroads, supra.

12. In that the Court failed to hold that libellant had acquiesced to the terms stated in claimant's letter of July 31, 1920.

[fol. 26] 13. In that the Court failed to hold that libellant had freedom of contract in that libellant could have towed its floats away from claimant's terminal as soon as they were unloaded and/or loaded.

14. In that the Court directed a decree in favor of libellant.

15. In that the Court failed to direct a decree in favor of claimant dismissing the libel.

Dated New York, N. Y., July 23, 1931.

Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Claimant.

[fol. 27] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated September —, 1931.

Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Appellant. Bigham, Englar, Jones & Houston, Proctors for Appellee.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 274

Argued February 18, 1932. Decided April 4, 1932

The New York Central Railroad Company, as Owner of The Car Float No. 37, Libelant-Appellee,

v.

The Tug Talisman, The Long Island Railroad Company, Claimant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an interlocutory decree in admiralty that the libelant, New York Central Railroad Company, recover dam-

ages done to its car float No. 37, through the fault of the tug Talisman, belonging to the Long Island Railroad Company, the latter company appeals. Reversed.

Burlingham, Veeder, Feary, Clark & Hupper, of New York City (Chauncey I. Clark and Paul Tison, both of New York City, of counsel), for claimant-appellant Long Island R. Co.

Bigham, Englar, Jones & Houston, of New York City (Leonard J. Matteson and Charles A. Van Hagen, Jr., both of New York City, of counsel), for libelant-appellee New York Cent. R. Co.

Purdy & Purdy, of New York City (William F. Purdy and John E. Purdy, both of New York City, of counsel), for Erie R. Co. amici curiæ.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal from an interlocutory decree in admiralty holding the steam tug Talisman, belonging to claimant Long Island Railroad, liable for damages sustained by the car float No. 37, belonging to New York Central Railroad. No. 37 was moored at claimant's terminal in Long Island City, East River, and was damaged by New York Central car float No. 58 in tow of claimant's tug Talisman. The collision and damage occurred on October 29, 1926, and was caused solely through the negligence of the tug Talisman while engaged in shifting No. 58 to a point at the same terminal where No. 37 was moored.

On July 31, 1920, libelant received a notice from the Long Island Railroad by registered mail stating that:

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City, and Bay Ridge, Brooklyn: All vessels, floats or any kind of floating equipment, lying at the Long Island Railroad terminal, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through

the negligence of this company and/or its employees or through other causes."

There was no proof of any objection on the part of the New York Central to the terms outlined in the foregoing notice, although it does not appear what, if any, use it made of the Long Island Railroad's terminal between September 1, 1920, and the time of the collision.

[fol. 30] The trial judge held that the notice did not suffice to relieve the tug Talisman from liability, for the reason that it could not contract against its own negligence.

Both railroads at the time of the accident were common carriers engaged in interstate commerce, and the claimant received car float No. 37 at its terminal at Long Island City in connection with transportation in interstate commerce of freight cars and freight. In such circumstances a notice imposing the conditions under which floating equipment would be received justified the Long Island Railroad Company in receiving the equipment at its terminal upon the conditions specified in the notice in the absence of some statute or rule of public policy prohibiting a contract against its own negligence.

It cannot be said that, because the notice was an old one, given six years before, it had no efficacy. Railroads must certainly be deemed to have in mind formal notices that are served upon them. It is probably the fact that the New York Central had sent many car floats to the Long Island Railroad terminal in the interval between the service of the notice and the date of the accident. But in any event, if any inference might be drawn from proof that it did not, an absence of dealing or other presumptive abandonment of the terms specified in the notice should have been shown by the libelant. As the matter stands, we have a notice giving the terms upon which the Long Island Railroad would receive floating equipment at its terminal and when the New York Central sent its car float there it must be regarded as having accepted the offer to receive it upon the terms indicated. Ten Eyck v. Director General (C. C. A.) 267 F. 974; The Cutchogue (C. C. A.) 10 F. (2d) 671; Sun Oil Co. v. Dalzell Towing Co. (C. C. A.) 55 F. (2d) 63.

The situation is quite different from that in McWilliams Bros. v. Davis (C. C. A.) 285 F. 312, where a notice had

been served by the Director General as operator of the Pennsylvania Railroad, stating that all towing of barges would be done at the risk of the tow, and that neither the tugs nor the Director General would be responsible for any damage done through negligence of the masters and crews of the tugs while engaged in the towage service. McWilliams Bros., who owned the barges in that case, served a notice declining to accept any limitation of ordinary liability for towage. We held that, where the Director General undertook to perform a towage service for McWilliams Bros. after receipt of the notice from it declining to accede to limitation of liability, the contract was made without reference to the limitation clause. In the present case, however, there was no objection to the terms of the notice, and the New York Central was accordingly in the position of one accepting an offer to receive its equipment without liability for negligence.

The question in the present case is whether the carrier was free to make such conditions as to liability as it thought best. If it was, there was a good contract, and the Long Island Railroad Company is not liable. Baltimore & Ohio, etc., Railway v. Voigt, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560; Owen McCaffrey's Sons v. Director General (D. C.) 282 F. 728; McCormick v. Shippy (C. C. A.) 124 F. 48; Long v. Lehigh Valley R. R. Co. (C. C. A.) 130 F. 870; Graves v. Davis, 235 N. Y. 315, 139 N. E. 280; Foreign T. & M. Co. v. Moran T. & T. Co., 56 F. (2d) —, decided by us April 4, 1932.

Ten Eyck v. Director General (C. C. A.) 267 F. 974, and The Cutchogue (C. C. A.) 10 F. (2d) 671, were towage cases where the carrier, sought to be held liable irrespective of its attempt to limit liability for its own negligence, was regarded as within its rights because the barge was not obliged to obtain the service. The distinction drawn by the trial court relied on the fact that the New York Central was obliged to go to the terminal and the Long Island Railroad Company was obliged to receive the New York Central float and to furnish it terminal facilities. The claimant, therefore, was thought to be in a position similar to that of a common carrier dealing with a passenger or shipper of freight. But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not

necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. Central R. Co. of New Jersey v. Anchor Line (C. C. A.) 219 F. 716.

Under Interstate Commerce Act, § 3, par. 3, 49 U. S. C. A. § 3 (3), carriers engaged in the transportation of passen- [fol. 31] gers or property must afford reasonable facilities for the interchange of traffic between their respective lines. Under section 3, par. 4, 49 U. S. C. A. § 3 (4), "if the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, * * * on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon "terms" for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the "terms" indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence.

The meaning of the word "compensation" in paragraph 4 might be restricted to charges to be paid for furnishing "terminal facilities." But the word "terms" is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which "terminal facilities" were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly

contemplates that it may do this. Having done so, it is in a similar position to that of the owners of the floating equipment in Ten Eyck v. Director General (C. C. A.) 267 F. 974, and The Cutchogue (C. C. A.) 10 F. (2d) 671, where the railroads had given notice that they would not be liable for injuries arising from negligent towage or shifting.

It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the "terms" were not freely agreed upon by the two carriers, though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved. The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in Gooch v. Oregon Short Line R. R. Co., 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been "satisfied to leave them to the Interstate Commerce Commission and the common law."

The New York Central has proved no cause of action against the tug Talisman. The decree is accordingly reversed, with costs, and the cause remanded, with directions to dismiss the libel.

[fol. 32] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 11th day of April, one thousand nine hundred and thirty-two.

NEW YORK CENTRAL RAILROAD COMPANY, Libellant-Appellee,

v.

Steam Tug "TALISMAN", LONG ISLAND RAILROAD COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Filed April 12, 1932

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed, with costs and cause remanded with directions to dismiss the libel.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 33] [File endorsement omitted.]

[fols. 34-39] Petition for rehearing, covering six pages, filed May 3, 1932, omitted from this print. It was denied, and nothing more by order of May 12, 1932.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Leonard J. Matteson, for the Petitioner.

OPINION ON PETITION FOR REHEARING—Filed May 5, 1932

Per CURIAM:

Petition denied.

L. H., T. W. S., A. N. H., United States Circuit Judges.

[fol. 41] [File endorsement omitted.]

[fol. 42] In United States Circuit Court of Appeals, Second Circuit

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 12th day of May, one thousand nine hundred and thirty-two.

[Title omitted]

Order Denying Rehearing—Filed May 11, 1932

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 43] [File endorsement omitted.]

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] Supreme Court of the United States

Order Allowing Certiorari—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,983. U. S. Circuit Court of Appeals, Second Circuit. Term No. 286. The New York Central Railroad Company, as owner of the carfloat "No. 37", petitioner, vs. Tug "Talisman", the Long Island Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed August 5, 1932. File No. 36,983.

FILE COPY

AUG 3 1932

IN THE

Supreme Court of the United States

OCTOBER TERM—1932—NO. 286

THE NEW YORK CENTRAL RAILROAD COMPANY,
as owner of the carfloat "No. 37",

Petitioner-Libellant,

—against—

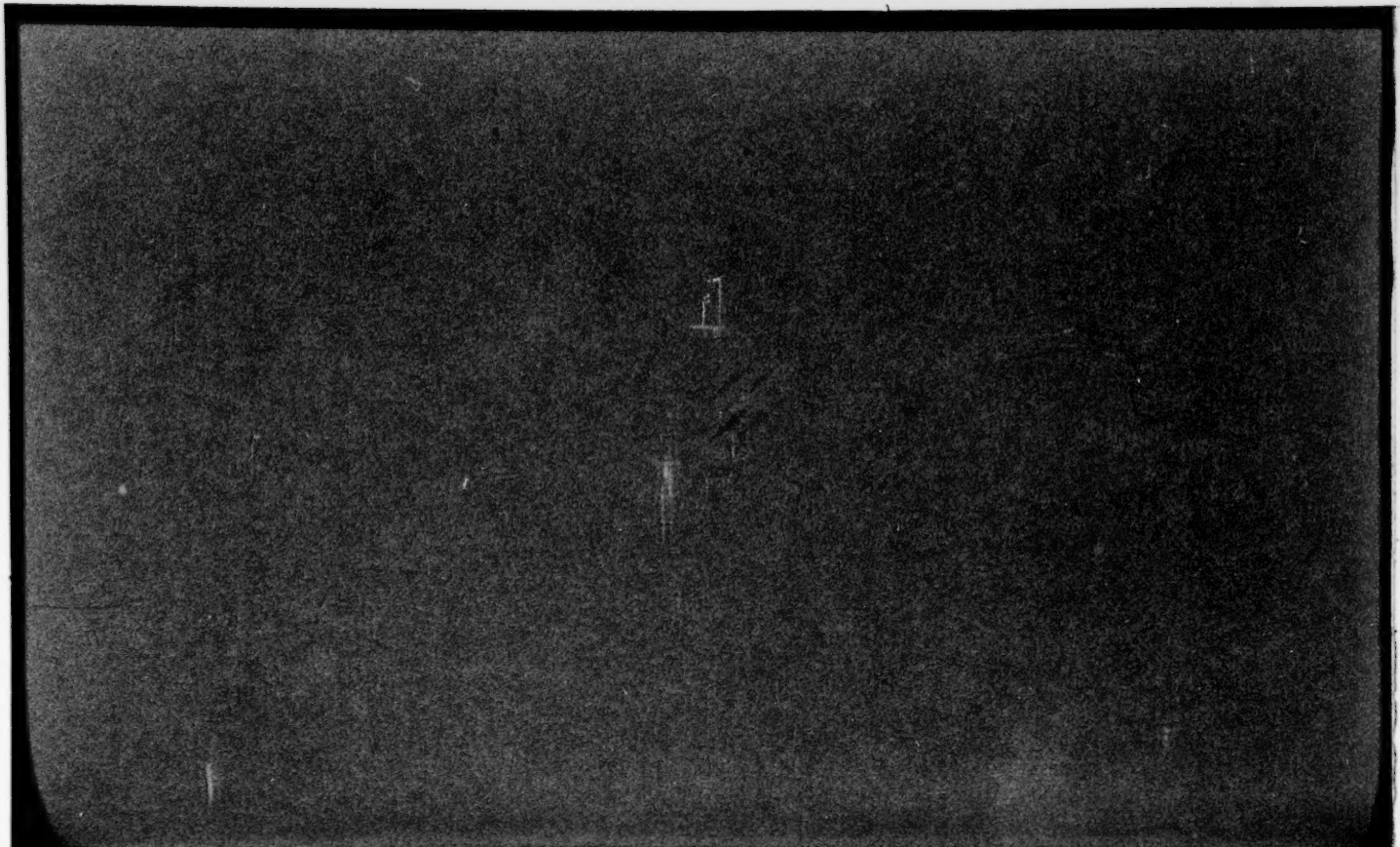
Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Claimant-Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

THE NEW YORK CENTRAL RAILROAD COMPANY,
as owner of the carfloat "No. 37",
Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,
Claimant-Respondent.

Petition.

Your petitioner, The New York Central Railroad Company, owner of carfloat "No. 37", respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review its order entered April 11, 1932 (R. 34), reversing the decree of the United States District Court for the Southern District of New York and its order entered May 12, 1932 (R. 40-41), denying petitioner's petition for a rehearing. The opinion of the Circuit Court of Appeals (R. 29-34) is officially reported at 57 F. (2d) 144. The original opinion of the District Court (R. 15-18) is officially reported at 52 F. (2d) 691.

The Nature of the Case.

This suit was instituted by the petitioner as owner of carfloat New York Central "No. 37" to recover damages

for injury sustained by that vessel while lying moored at float bridge No. 6 at the terminal of the Long Island Railroad Company at Long Island City, N. Y. as a result of being struck by another carfloat which was brought into collision with the "No. 37" by respondent's tug "Talisman". It was agreed by the parties:

(a) That the collision and consequent damage were occasioned solely by reason of negligence of the tug "Talisman" (Stipulation of Facts, §1, R. 12);

(b) That the petitioner and the respondent were, at the time of this accident, common carriers engaged in interstate commerce, and that the respondent received petitioner's carfloat "No. 37" at the respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation of Facts, §3, R. 12-13);

(c) That more than four years prior to the accident in question, the libellant received by registered mail from the claimant, a certain notice dated July 31, 1920, pleaded by respondent as a bar to this action (Answer, R. 10) and made no reply thereto, such notice reading as follows:

> "We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.
>
> On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equip-

ment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn.

Yours very truly,

H. L. DES ANGES,
Marine Superintendent."

(Stipulation of Facts, §5, R. 13-14).

The respondent contended in the District Court and in the Circuit Court of Appeals that the Long Island Railroad Company was relieved of liability for damage to libellant's float by its notice of July 31, 1920, and that the act of the petitioner in sending its float to the Long Island Railroad Terminal for the interchange of traffic in interstate commerce, constituted an agreement to the notice and a contract exempting the Long Island Railroad Company from liability for the damage sustained by float "No. 37".

The District Court (Knox, *D. J.*), held that as both petitioner and respondent were common carriers engaged in transportation in interstate commerce, and the petitioner in the discharge of the duty which it owed to the public was compelled to send its floats to the terminal which the respondent was required by law to main-

tain for the interchange of interstate traffic and, further, that inasmuch as the respondent was under an obligation to receive such freight as might be delivered to the terminal by petitioner, the petitioner's proper and usual facilities for carrying freight to the terminal were entitled to common law protection from negligent acts of the respondent during such reasonable periods of time as they were on respondent's property, and that the respondent's notice was a mere *ipse dixit* in an effort to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic with another carrier and was ineffective (Opinion, R. 18).

The Circuit Court of Appeals, reversing the District Court, held that the notice of the Long Island Railroad Company gave the terms upon which the respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 31). It held further that such an agreement was authorized under Sec. 3, par. 4 of the Interstate Commerce Act, authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal facilities" to any other carrier on such terms and for such compensation as the carriers may agree upon or as the Commission may fix as just and reasonable. The court therefore held that the case was within the doctrine of its decisions in the cases of *Ten Eyck* vs. *Director General* (C. C. A. 2), 267 F. 974, certiorari denied, 254 U. S. 646; *The Cutchogue,* (C. C. A. 2) 10 F. (2d) 671; *Sun Oil Company* v. *Dalzell Towing Company Inc** (C. C. A. 2), 55 F. (2d) 63 (R. 31).

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* A writ of certiorari has now been granted by this Court in the *Sun Oil Company* case, May 23, 1932, and that case is now on the calendar of this Court for argument at the October Term, 1932.

The Circuit Court of Appeals therefore reversed the decree of the District Court and directed that the petitioner's libel be dismissed.

The Questions Presented.

1. *Can a carrier engaged in interstate commerce and maintaining a terminal, including floating bridges, for the receipt, delivery and interchange of freight in interstate commerce, exclude from its terminal, carfloats of a connecting carrier engaged in interstate commerce and impose on such connecting carrier terms, including an exemption from liability for negligent injury to the floating equipment of such connecting carrier, as a condition of allowing such floating equipment to receive or discharge freight in course of transit in interstate commerce, at its terminal?*

2. *Did the petitioner, by sending its carfloat to The Long Island Railroad Terminal for the purpose of interchanging traffic in interstate commerce, thereby make a valid contract with the respondent The Long Island Railroad Company exempting the respondent from liability for damage sustained by petitioner's carfloat while at respondent's terminal as the result of respondent's negligence IN THE OPERATION OF OTHER FLOATING EQUIPMENT owned and operated by the respondent?*

The decision of the Circuit Court of Appeals is based on the proposition that "when the New York Central sent its carfloat there, it must be regarded as having accepted the offer to receive it upon the terms indicated" (R. 31).

The decision presupposes that the Long Island Railroad had a right to state "terms" on which it would

agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to exclude the New York Central carfloat from its terminal unless the conditions were accepted.

The Circuit Court of Appeals further said:

> "* * * the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 33).

The decision therefore assumes that the petitioner, although a connecting carrier, engaged in the service of the public in interstate commerce, with freight to discharge and receive at the Long Island Terminal, could decline to send its carfloat to that terminal if it was dissatisfied with the terms on which the Long Island Railroad Company was willing to permit the New York Central carfloat to discharge and receive freight at the Long Island Terminal.

We submit that both assumptions of the Circuit Court of Appeals are indefensible and that, if sustained, the decision will lead to chaotic conditions.

Moreover, the Circuit Court of Appeals was quite in error in assuming that this case involves such a use of the terminal facilities of one carrier as the Interstate Commerce Commission is authorized to require by another carrier and for which use it is empowered to fix terms under the provisions of the Interstate Commerce Act (U. S. Code, Tit. 49, Chap. 1, Sec. 3, Par. 4).[1] Such a use of terminal facilities is illustrated by such an outstanding example as the use of Grand Central Terminal, its tracks and facilities at New York City, owned by The New York Central Railroad Company, by the

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[1] Printed Appendix, p. 27.

New York, New Haven & Hartford Railroad Company *for the latter's own business* and on a rental basis, or the use of the Union Station at Cleveland (see *Pittsburgh & W. Railway Co.* v. *U. S.*, 41 F. (2d) 806). The essential characteristic of the use of terminal facilities contemplated by Sec. 3, Par. 4, is the use of the terminal facilities of one carrier by another *for the latter's own business*[1] for which use compensation and terms are evidently proper. Plainly the intent of Par. (4) was not to authorize one carrier to impose terms on another as a condition of doing business with that other as a connecting carrier in interstate commerce. That situation is controlled by Par. (3),[2] which *requires* all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

The New York Central in sending its float to the Long Island Terminal was not making use of the terminal facilities of the Long Island Railroad for its own business, but was sending its float to the terminal for the interchange of traffic in interstate commerce for which purpose the Long Island was bound to afford "reasonable and proper facilities".

Consequently the Circuit Court of Appeals was in error in suggesting that petitioner's remedy is by application to the Interstate Commerce Commission to fix "the terms" on which The New York Central might be entitled to facilities for the interchange of traffic with the Long Island Railroad (R. 33). That commission has no power or authority to fix such terms.

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[1] This is brought out plainly by the initial condition expressed in the statute that such use shall not impair the ability of the "carrier owning or entitled to the enjoyment of terminal facilities *to handle its own business*".

[2] Printed Appendix, p. 27.

Since it is plain that the respondent could not refuse to receive the petitioner's carfloat, or to afford reasonable facilities for the interchange of traffic, or impose terms as a condition of so doing, and since it is plain also that the petitioner was obliged to send its float to respondent's terminal for the exchange of traffic, it is clear that no contract exempting the respondent from liability can be spelled out. The respondent had no consideration to offer for such a contract and the act of petitioner in sending its float is shorn of any significance as an acceptance of the respondent's "terms", for petitioner's act was not voluntary, but an obligatory part of its public duty.

The decision of the Circuit Court of Appeals is definitely in conflict with the applicable local decisions. The identical question here presented was decided with exactly the opposite result in the state courts of New York State in the case of *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474 (City Court of the City of New York, affirmed Appellate Term, without opinion, leave to appeal to Appellate Division denied). The decision of Judge Valente in *The Patchogue* was fully approved and followed in the District Court in this case by Judge Knox, who quoted at length from the opinion (R. 49). The Circuit Court of Appeals did not attempt to distinguish and, in fact, ignored the decisions of the courts of New York State on the identical question.

Furthermore, the decision of the Circuit Court of Appeals, in sustaining the attempt of the Long Island Railroad Company to impose a contract on the petitioner exempting the respondent from liability for negligence, is in conflict with the decisions of this Court and with the circuit courts of appeal in other circuits. This Court has refused to recognize the validity of

similar contracts relating to towing in its decisions in the *Steamer Syracuse,* 12 Wall. 167, and *Compania de Navegacion* v. *Fireman's Fund Ins. Company* (*The Wash Gray*), 277 U. S. 63. In the case of *Sun Oil Company,* petitioner v. *Dalzell Towing Company, Inc.,* respondent, Supreme Court of the United States, October Term, 1931, No. 874, this court granted a writ of certiorari on May 23, 1932, to the Circuit Court of Appeals for the Second Circuit to review its decision sustaining such a contract relating to the furnishing of a pilot in connection with a towage agreement. The decision of the Circuit Court of Appeals in the *Sun Oil Company* case was cited by that Court, among others, as authority for its decision in this case (R. 31). In the petition for certiorari filed in the *Sun Oil Company* case, it was pointed out that the decision of the Circuit Court of Appeals for the Second Circuit in that case is in conflict with the decisions of this court in the cases cited, *supra,* and of the federal courts in the 1st, 4th, 5th and 9th Circuits in the following cases:

The Somers N. Smith (D. C. Me.), 120 Fed. 569;

The Monarch (D. C. Fla.), 235 Fed. 795;

Mylroie v. *British Columbia Mills Tug & Barge Co.* (C. C. A. 9), 268 Fed. 449;

The Sea Lion (D. C. Cal.), 12 F. (2d) 124;

United States v. *Norfolk-Berkley Bridge Corp. et al.* (E. D. Va.), 29 F. (2d) 115;

Calzavaro v. *Planet S. S. Corp. et al.* (C. C. A. 4), 31 F. (2d) 885.

Although the cases cited relate to contracts to tow or to furnish a pilot, we submit that there is no ground for distinction between those cases and the

present. If any, the difference is favorable to the petitioner's position here. Petitioner in dealing with respondent, as a connecting carrier, was in the same position as any other member of the public dealing with a common carrier.

> *Atchison T. & S. F. Railroad Co.* v. *Denver, etc. R. Co.*, 110 U. S. 667;
> 10 Corpus Juris, Carriers 563, s. 938.

As pointed out by the State Court in the case of *The Patchogue, supra,* 126 Misc. (N. Y.) 474, 478:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani* v. *Wilson,* 188 App. Div. 626."

Judge Knox in the District Court took the same view in the present case, saying:

> "Furthermore, claimant was under an obligation to receive such freight as might be delivered to the terminal by libellant; and, during such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 18).

Moreover, the decisions of this Court in *The Syracuse* and *Compania de Navegacion* cases, *supra,* show clearly that any such notice as that relied upon by the respondent here must be construed most strictly against the respondent and that no contract exempting the respond-

ent from negligence will be spelled out unless the same is proven clearly and beyond any question. We call attention to the fact that the notice in this case applied "to all floating equipment *lying at Long Island Railroad Company Terminals*" (R. 13). We submit that this notice should be construed to be limited to carfloats "lying at Long Island Railroad Company Terminals" beyond "such reasonable periods of time", in the language of Judge Knox, as required for the interchange of traffic. Such use of the respondent's terminal facilities beyond the reasonable period required for the interchange of interstate traffic has not been shown by the respondent in this case and consequently, as so interpreted, the notice has not been shown to be applicable and cannot be sustained as a defense.

As a matter of fact even if it is considered that petitioner was making use of the terminal facilities of the respondent at the time of this accident, the injury to petitioner's carfloat was in no way related to, or a risk of, that use. It was merely a circumstance that the float was lying in the float bridge when injured by the respondent through negligence in the operation of *other floating equipment*. The petitioner's float was lawfully in the float bridge and the rules governing respondent's liability should be no different than if the collision had occurred while the float was in mid-river. Surely respondent would not be permitted to claim exoneration from liability for such a collision, as a condition of petitioner's float being permitted to lie at its terminal.

We submit that no valid contract exempting the respondent from liability under the circumstances of this case was shown; that the decision of the Circuit Court of Appeals is wrong, and should be reviewed by this Court.

Reasons for Allowance of Writ.

1. The decision of the Circuit Court of Appeals authorizing a common carrier engaged in interstate commerce to impose terms on another as a condition of the normal interchange of traffic, and impliedly recognizing the right of such carrier to refuse to afford reasonable facilities for the interchange of traffic with its connecting carrier except upon its proposed terms, and of the connecting carrier to refuse to interchange traffic unless such terms are withdrawn, is a question of public interest and importance of widespread application and of far reaching results if the decision of the Circuit Court of Appeals is allowed to stand.

2. The decision of the Circuit Court of Appeals involves a misinterpretation and a misapplication of Chap. I, Sec. 3, par. 4 of the Interstate Commerce Act, which has not been, but should be, authoritatively interpreted by this Court.

3. The decision of the Circuit Court of Appeals is diametrically opposed to the decisions of the courts of the State of New York on the identical question.

4. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in *The Syracuse* and the *Compania de Navegacion* (Wash Gray) cases, *supra*, is in conflict with the decisions of the federal courts in other circuits, cited *supra*, and is based in part on its own decision in the case of *Sun Oil Company* v. *Dalzell Towing Company Inc.*, 55 F. (2d) 63, which this Court has undertaken to review by granting a petition for a writ of certiorari.

5. The decision of the Circuit Court of Appeals has decided an important question of general law in a way

probably untenable and in conflict with the weight of authority.

We submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered on its docket No. 274, October Term, 1931, and entitled "The New York Central Railroad Company, as owner of the carfloat 'No. 37', Libellant-Appellee vs. the tug 'Talisman', The Long Island Railroad Company, Claimant-Appellant"; and that the decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court as herein prayed for; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE NEW YORK CENTRAL RAILROAD COMPANY,

By D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

THE NEW YORK CENTRAL RAILROAD COMPANY,
as Owner of the carfloat "No. 37",
Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,
Claimant-Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The facts are fully stated in the petition. These suits are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction is invoked under Tit. 28, chap. 347, U. S. Code, as amended by the Act of February 13, 1925, 43 Stat. 938 and under Art. 3, §2 of the Constitution of the United States.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In reversing the decision of the District Court in favor of the libellant on stipulated facts and in reversing the interlocutory decree entered by the District Court in favor of the libellant.

2. In holding that when The New York Central sent its carfloat to the Long Island Railroad Terminal it must be regarded as having accepted the offer of the respondent Long Island Railroad Company to receive such carfloat upon terms exempting the respondent from the liability for negligent injury to petitioner's float while at respondent's terminal.

3. In holding that the petitioner entered into a valid contract with the respondent exempting the respondent from liability for negligent injury to petitioner's float under the circumstances of this case.

4. In holding that the Long Island Railroad Company furnished good consideration for such a contract.

5. In holding that the respondent was free to make such conditions as to liability as it thought desirable as a condition to receiving petitioner's carfloat at its terminal.

6. In holding that the petitioner in sending its carfloat to the Long Island Railroad Terminal in connection with the transportation of freight cars and freight in interstate commerce was making a use of the respondent's terminal facilities within the meaning of the provisions of tit. 49, Sec. 3, par. 4, U. S. Code for which, by the provisions of such section, the Interstate Commerce Commission is authorized to fix terms and compensation.

7. In holding that the petitioner could have appealed to the Interstate Commerce Commission if it did not wish to agree to the terms proposed by the respondent and in failing to do so freely agreed upon such terms.

POINT I.

Respondent furnished petitioner only those reasonable facilities for the interchange of traffic required by the provisions of the Interstate Commerce Act as to which it could impose no conditions or terms. There was no consideration to support a contract and no act of petitioner constituting an agreement to the proposed "conditions".

The respondent relies upon an affirmative defense, that is, a contract to exempt it from liability for the results of its admitted negligence. The legal situation is exactly stated in the diametrically opposed decision of Judge Valente in the State Court in *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, which was ignored by the Circuit Court of Appeals:

> "It is not proven that plaintiff agreed to this letter, which, so far as appears, was a unilateral and voluntary communication by the defendant company, unacceded to, and unapproved by the plaintiff company. The burden emphatically, therefore, rests upon defendant to prove that the terms of this letter are legally authorized by law and juridically effective between the respective parties" (p. 476).

The section of the Interstate Commerce Act (Chap. 1, sec. 3, par. 3)—requiring the respondent to afford to the petitioner, as a connecting carrier, reasonable and proper facilities for the interchange of traffic—is printed herewith, Appendix, p. 27. The petitioner and the respondent are connecting carriers. It is stipulated that at the time of the accident petitioner's carfloat was lying

in the respondent's float bridge and had been there received by the respondent in connection with the transportation in interstate commerce of freight cars and freight (R. 12, 13). The interests of the parties in the through transportation of freight was mutually exclusive. The New York Central's interest in the contract of transportation ceased upon the transfer of the cars from its float to the Long Island tracks at the bridge and vice versa. The petitioner made no use of the respondent's tracks or terminal facilities. It merely placed its float at the bridge so that a transfer of cars and freight from one line to the other might be made. The respondent had no more right to exclude the petitioner's carfloat from entering its float bridge for this interchange of traffic than it would have to exclude an individual or a public drayman from the loading platform of any of its stations for the purpose of doing business with the respondent. No more could it impose terms or conditions.

The Circuit Court of Appeals ignored par. 3, *supra*, and fell into the error of assuming that the petitioner in sending its float to the respondent's float bridge was making a use of the respondent's terminal facilities such as is provided for in Interstate Commerce Act, Chap. 1, sec. 3, par. 4 (Printed Appendix, p. 27), which might be required of one carrier for the benefit of another and for which use the commission is empowered to fix terms (R. 32, 33).

The Court said:

> "We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatis-

fied with them. It contracted without an appeal to the Commission. * * * It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right" (R. 33).

But the use of terminal facilities contemplated by par. 4 is the use of such facilities belonging to one carrier by another *for its own business.* This is plainly shown by the statutory condition at the outset of the section that such use may be ordered when "practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities *to handle its own business*". This section has been recently construed with respect to the Union Terminal at Cleveland, *Pittsburg and W. Ry. Co. v. U. S.* 41 Fed. (2d) 806, affirmed 281 U. S. 479. No such use of the respondent's terminal facilities for the petitioner's business was offered by respondent or accepted by the petitioner in this case. There was only an interchange of traffic whereby business accepted by one carrier for through transportation became the business of the other upon transfer from petitioner's float to respondent's tracks or vice versa. No authority is granted to the Interstate Commerce Commission by the act to fix terms or conditions for such interchange. On the contrary, under par. 3, respondent was obliged to afford all reasonable and proper facilities for such interchange.

We submit, therefore, that the petitioner, not desiring

to be bound by the conditions propounded by the respondent, acted properly in ignoring the notice and the conditions which the respondent had no right to propose. An appeal to the Interstate Commerce Commission under par. 4, such as suggested by the Circuit Court of Appeals, would have been inappropriate, for that section was totally inapplicable. We submit that the decision of the State Court in *The Patchogue* and of the District Court below were right in holding that the respondent offered the petitioner only the facilities it was bound to offer and that there was no consideration to support a contract.

On the other hand, it is equally true that the act of the petitioner in sending its float to the respondent's terminal was not voluntary and was consequently of no significance as an indication of its acceptance of the respondent's proposed conditions. As Judge Knox pointed out:

> "The libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 18).

Similarly, *The Patchogue*, 126 Misc. (N. Y.) 474, 477.

The cases relied upon by the Circuit Court of Appeals, *Ten Eyck* v. *Director General*, 267 F. 974, and *The Cutchogue*, 10 F. (2d) 671 (R. 33), are quite inapplicable. In each of those cases the respondent offered to furnish a service (towage) which it was not, in any event, bound to furnish. The libellant was a free agent not for any reason required to accept the service offered. The libellant in accepting the respondent's offer in those cases, of course,

accepted the offer as made, including the conditions attached. In those cases the libellant's voluntary act could fairly be regarded as an acceptance of the offer. In this case the libellant's act was obligatory and involuntary and consequently of no significance as an acceptance. The essential elements of a contract were, therefore, totally lacking.

POINT II.

The contract which respondent attempted to impose upon petitioner was in no event a valid contract exonerating respondent from liability for negligent injury to petitioner's carfloat under the circumstances of this case.

The State Court in ruling on the identical defense of the respondent in a case involving another connecting carrier said:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani Bros., Inc.* v. *Wilson Sons & Co., Ltd.*, 188 App. Div. 617, 620."
>
> *B. & O. R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. (N. Y.) 474, 478 (City Court of the City of New York, decision affirmed Appellate Term—leave to appeal to Appellate Division denied).

The foregoing excerpt from the decision of the City

Court was quoted with approval by Judge Knox in the District Court in this case (R. 17), who added:

> "During such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 18).

This Court in *The Syracuse,* 12 Wall. 167, 171, dealing with an attempt to exonerate a tugboat from liability for negligent injury to her tow by reason of an alleged contract, said:

> "Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

That decision was followed and elaborated by this Court in *Compania de Navegacion* v. *Fireman's Fund Ins. Company,* 277 U. S. 66.

This Court's decision in *The Syracuse* has been taken by the Courts of the First, Fourth, Fifth and Ninth Circuits to mean that a tugboat is not allowed by law to avoid by a contract the consequences of its own negligence:

> *Mylroie* v. *British Columbia Mills Tug & Barge Co.,* 268 Fed. 449, 451-2 (C. C. A. 9);
> *The Somers N. Smith,* 120 Fed. 572, 576;
> *The Monarch,* 235 Fed. 795, 799 (D. C. Fla);

The Sea Lion, 12 F. (2d) 124 (D. C. Cal.);
U. S. v. *Norfolk-Berkley Bridge Corp., et al.*, 29 F. (2d) 115, 118 (E. D. Va.);
Calzavaro v. *Planet S. S. Corp., et al.*, 31 F. (2d) 885 (C. C. A. 4).

The contrary view has been taken in the Second Circuit—

The Oceanica (C. C. A. 2), 170 Fed. 893;
Ten Eyck v. *Director General*, 267 Fed. 974 (C. C. A. 2);
The Cutchogue, 10 F. (2d) 671 (C. C. A. 2).

and the view of the Circuit Court of Appeals for the Second Circuit has been adopted by the District Court for the District of Georgia in the Fifth Circuit:

The Pacific Maru, 8 F. (2d) 166.

Following its view in the towage cases, the Circuit Court of Appeals for the Second Circuit has held valid a provision for exemption from liability for negligence in a contract to furnish pilotage in connection with a towage service—

Sun Oil Company v. *Dalzell Towing Co. Inc.* (C. C. A. 2), 55 F. (2d) 63

But, as already noted, this Court has granted a writ of certiorari to review the decision of the Circuit Court of Appeals in that case and argument will be heard at the coming term.

We submit that the reasons for holding that the respondent is not allowed by law to avoid by contract the consequences of its own negligence under the circumstances of this case, are more compelling even than in the towage cases. Petitioner, as a connecting carrier,

was dealing with the respondent on the same basis as any other member of the public and had the same rights—

A. T. & S. F. R. R. Co. v. *Denver etc. R. Co.*, 110 U. S. 667.

Certainly any member of the travelling public, having lawful business which requires him to enter or approach the terminal of a public carrier, is entitled to common law protection against injury by negligent act of the carrier, and a notice posted on the premises notifying the public that the carrier will not be liable for negligent injury to persons visiting its terminal on lawful business would certainly be held ineffective. We submit that this is exactly what the respondent has attempted in this case and what the Circuit Court of Appeals has upheld, and that the attempted contract sought to be imposed by the respondent on the libellant should, in no event, be held valid.

It is clear, moreover, that in any event the proposed contract must be most strictly construed against the respondent and that any doubt should be resolved in favor of the petitioner——

B. & O. R. R. Co. v. *L. I. R. R. Co.*, 126 Misc. (N. Y.) 474, 478;
McCaffrey's Sons v. *Director General of Railroads* (D. C. N. Y.), 282 Fed. 728

The respondent's notice is with respect to floating equipment "lying at Long Island Railroad Company Terminals" (R. 16). Carfloats and other craft frequently lie at respondent's terminal for considerable periods of time before they are removed. It is stipulated that petitioner's carfloat was "moored in bridge No. 6" (R. 12) "in connection with transportation in interstate

commerce of freight cars and freight" (R. 13). We submit that a distinction can, and should, be drawn between floats moored in the float bridge for interchange of freight, and floats lying at the terminal beyond such reasonable periods of time as required for proper interchange of freight. The respondent has not shown that the petitioner's float lay at the terminal beyond such reasonable period of time. In fact, on the contrary, the stipulation shows that the float was actively engaged in the business for which it was sent to the terminal at the time the damage was inflicted

Moreover, as pointed out in the petition (p. 11) the injury to petitioner's float by respondent's negligence in the operation of other floating equipment was not a risk connected with or arising out of any use by petitioner of respondent's terminal. The petitioner's float was lawfully at the terminal and the legal situation is no different than if respondent's tug had run down petitioner's carfloat while in the river en route to the terminal. Respondent's notice should not be so construed as to include an injury so unrelated to a normal use of respondent's terminal and, if so construed, clearly should be held invalid.

We submit, therefore, that the contract which the respondent attempted to impose on the libellant was neither valid nor applicable to the circumstances of this case.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the question pre-

sented involving the relations of connecting carriers in interstate commerce, the misconstruction by the Court of the provisions of the Interstate Commerce Act, the conflict between the decisions in the State and Federal Courts on the particular question involved, and the conflict between the courts in different circuits as to the validity of the contract attempted to be imposed, which subject this Court has already called up for review in the case of *Sun Oil Company* v. *Dalzell Towing Company, Inc., supra.*

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.

Appendix A.

EXTRACTS FROM INTERSTATE COMMERCE ACT, U. S. CODE, TIT. 49, SEC. 3, PARS. 3 & 4.

(3) INTERCHANGE OF TRAFFIC. All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) TERMINAL FACILITIES; USE OF AND COMPENSATION FOR. If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately

secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, c. 104, §3, 24 Stat. 380; Feb. 28, 1920, c. 91, §405, 41 Stat. 479; Mar. 4, 1927, c. 510, §1, 44 Stat. 1447.)

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 286.

THE NEW YORK CENTRAL RAILROAD COMPANY, as Owner of the Carfloat "No. 37",

Petitioner-Libellant,

—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Claimant-Respondent.

BRIEF FOR PETITIONER.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.

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—against—

Tug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Claimant-Respondent.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Circuit Court of Appeals appears in the record at page 15 and is reported at 57 F. (2d) 144. The opinion of the District Court appears in the record at page 8 and is officially reported 52 F. (2d) 691.

Jurisdiction of This Court.

A petition for a writ of certiorari was filed August 5, 1932 (R. 21), and was granted by order of this Court filed October 17, 1932 (R. 21). Jurisdiction of this Court is under Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347) and under Article 3, Section 2 of the Constitution of the United States.

The Nature of the Case.

By this writ the petitioner seeks to review the decree of the United States Circuit Court of Appeals for the Second Circuit, filed April 12, 1932 (R. 20), petition for rehearing denied May 12, 1932 (R. 20), reversing the interlocutory decree in favor of the libellant entered by the United States District Court for the Southern District of New York, July 17, 1931 (R. 10, 11), on the opinion of the Honorable John C. Knox, District Judge (R. 8-10).

This suit was instituted by the petitioner as owner of carfloat New York Central "No. 37", to recover damages for injury sustained by that vessel on October 29, 1926, while lying moored at float bridge No. 6 at the terminal of the Long Island Railroad Company at Long Island City, N. Y., as a result of being struck by another carfloat which was brought into collision with the "No. 37" by respondent's tug "Talisman". It was agreed by the parties:

(a) That the collision and consequent damage were occasioned solely by reason of negligence of the tug "Talisman" (Stipulation of Facts, §1, R. 6);

(b) That the petitioner and the respondent were, at the time of this accident, common carriers engaged in interstate commerce, and that the respondent received petitioner's carfloat "No. 37" at the respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation of Facts, §3, R. 6-7);

(c) That more than four years prior to the accident in question, the libellant received by registered mail from the claimant, a certain notice dated July 31, 1920, pleaded by respondent as a bar to this action (Answer, Par. Ninth,

R. 5-6) and made no reply thereto, such notice reading as follows:

> "We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.
>
> On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.
>
> This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.
>
> This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn.
>
> Yours very truly,
>
> H. L. DES ANGES,
> Marine Superintendent."

(Stipulation of Facts, §5, R. 7.)

The respondent contended in the District Court and in the Circuit Court of Appeals that the Long Island Railroad Company was relieved of liability for damage to libellant's float by its notice of July 31, 1920, and that the act of the petitioner in sending its float to the Long Island Railroad Terminal for the interchange of traffic in interstate commerce, constituted an agreement to the notice and

a contract exempting the Long Island Railroad Company from liability for the damage sustained by float "No. 37".

Basis of Decisions Below.

The District Court (Knox, *D. J.*), held that as both petitioner and respondent were common carriers engaged in transportation in interstate commerce, and the petitioner in the discharge of the duty which it owed to the public was compelled to send its floats to the terminal which the respondent was required by law to maintain for the interchange of interstate traffic and, further, that inasmuch as the respondent was under an obligation to receive such freight as might be delivered to the terminal by petitioner, the petitioner's proper and usual facilities for carrying freight to the terminal were entitled to common law protection from negligent acts of the respondent during such reasonable periods of time as they were on respondent's property, and that the respondent's notice was a mere *ipse dixit* in an effort to shift its responsibility to afford reasonable, proper and equal facilities for the interchange of traffic with another carrier and was ineffective (Opinion, R. 8-10).

The Circuit Court of Appeals, reversing the District Court, held that the notice of the Long Island Railroad Company gave the terms upon which the respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 16). It held further that such an agreement was authorized under Sec. 3, par. 4 of the Interstate Commerce Act, authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal facilities" to any other carrier on such terms and for such compensation as the carriers may agree upon

or as the Commission may fix as just and reasonable (R. 18-19). The court therefore held that the case was within the doctrine of its decisions in the cases of *Ten Eyck* v. *Director General* (C. C. A. 2), 267 F. 974, certiorari denied, 254 U. S. 646; *The Cutchogue* (C. C. A. 2) 10 F. (2d) 671; *Sun Oil Company* v. *Dalzell Towing Company Inc.* (C. C. A. 2), 55 F. (2d) 63 (R. 16, 19).

The Circuit Court of Appeals therefore reversed the decree of the District Court and directed that the petitioner's libel be dismissed.

The decision of the Circuit Court of Appeals is directly in conflict with the applicable local decisions. The identical question here presented was decided with exactly the opposite result in the state courts of New York State in the case of *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474 (City Court of the City of New York, affirmed Appellate Term, without opinion, leave to appeal to Appellate Division denied). The decision of Judge Valente in *The Patchogue, supra,* was fully approved and followed in the District Court in this case by Judge Knox, who quoted at length from the opinion (R. 9). The Circuit Court of Appeals did not attempt to distinguish and, in fact, ignored the decisions of the courts of New York State on the identical question.

The Questions Presented.

1. *Can a carrier engaged in interstate commerce and maintaining a terminal, including floating bridges, for the receipt, delivery and interchange of freight in interstate commerce, exclude from its terminal, carfloats of a connecting carrier engaged in interstate commerce and impose on such connecting carrier terms, including an exemption from liability for negligent injury to the floating equipment of such connecting carrier, as a condition of allowing such*

floating equipment to receive or discharge freight in course of transit in interstate commerce, at its terminal?

2. *Did the petitioner, by sending its carfloat to The Long Island Railroad Terminal for the purpose of interchanging traffic in interstate commerce, thereby make a valid contract with the respondent The Long Island Railroad Company exempting the respondent from liability for damage sustained by petitioner's carfloat while at respondent's terminal as the result of respondent's negligence in the operation of other floating equipment owned and operated by the respondent?*

POINT I.

The Circuit Court of Appeals erred in holding that the petitioner entered into a contract exempting the respondent from liability for negligent injury to petitioner's carfloat. There was no consideration to support a contract and no act of petitioner constituting an agreement to the proposed "conditions".

The respondent relies upon an affirmative defense, that is, a contract to exempt it from liability for the results of its admitted negligence. The legal situation is precisely stated in the diametrically opposed decision of Judge Valente in the State Court in *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, which was ignored by the Circuit Court of Appeals:

> "It is not proven that plaintiff agreed to this letter, which, so far as appears, was a unilateral and voluntary communication by the defendant company, unacceded to, and unapproved by the plaintiff company. The burden emphatically, therefore, rests upon defendant to prove that the terms of this letter are

> legally authorized by law and juridically effective between the respective parties" (p. 476).

It is not asserted that there was ever any express agreement by petitioner to respondent's attempted self-exemption from liability for negligence, but the Circuit Court of Appeals accepted respondent's theory as follows:

> "As the matter stands, we have a notice giving the terms upon which the Long Island Railroad would receive floating equipment at its terminal and when the New York Central sent its carfloat there it must be regarded as having accepted the offer to receive it upon the terms indicated" (R. 16).

The decision presupposes that the Long Island Railroad had a right to state "terms" on which it would agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to exclude the New York Central carfloat from its terminal unless the conditions were accepted.

The Circuit Court of Appeals further said:

> "* * * the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 18).

The decision therefore assumes that the petitioner, although a connecting carrier, engaged in the service of the public in interstate commerce, with freight to discharge and receive at the Long Island Terminal, could decline to send its carfloat to that terminal if it were dissatisfied with the terms on which the Long Island Railroad Company was willing to permit the New York Central carfloat to discharge and receive freight at the Long Island Terminal.

We submit that both assumptions of the Circuit Court of Appeals are indefensible and that, if sustained, the decision will lead to chaotic conditions.

The relations of the parties with respect to this transaction were controlled by the provisions of the Interstate Commerce Act (Chap. 1, Sec. 3, par. 3)[1] entitled "Interchange of Traffic", which requires all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

The petitioner and the respondent are connecting carriers. It is stipulated that at the time of the accident petitioner's carfloat was lying in the respondent's float bridge and had been there received by the respondent in connection with the transportation in interstate commerce of freight cars and freight (R. 6). The interests of the parties in the through transportation of freight were mutually exclusive. The New York Central's interest in the contract of transportation ceased upon the transfer of the cars from its float to the Long Island tracks at the bridge and *vice versa*. The petitioner made no use of the respondent's tracks or terminal facilities. It merely placed its float at the bridge so that a transfer of cars and freight from one line to the other might be made. The respondent had no more right to exclude the petitioner's carfloat from entering its float bridge for this interchange of traffic than it would have to exclude from the loading platform of any of its freight stations an individual or a public drayman who came there for the purpose of receiving or delivering freight. No more could it impose terms or conditions.

The Circuit Court of Appeals ignored par. 3, *supra*, and attempted to justify its conclusion by asserting that the agreement which respondent attempted to impose on petitioner as a condition of affording the petitioner as a connecting carrier, reasonable and proper facilities for the interchange of traffic, was such an agreement as is authorized by that provision of the Interstate Commerce Act (U. S. Code, Tit. 49, Chap. 1, Sec. 3, Par. 4)[1] which au-

[1] Printed Appendix, page 23.

thorizes the Interstate Commerce Commission in the public interest to require the use of any terminal facilities of one carrier by another on such terms as the carriers may agree upon, or in the event of failure to agree, upon such terms as the commission may fix as just and reasonable.

The Court said:

> "We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. * * * It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon any terms, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right" (R. 18-19).

In this we submit the Circuit Court of Appeals fell into grievous error. Such a use of terminal facilities, as is contemplated by the section cited, is illustrated by such an outstanding example as the use of Grand Central Terminal, its tracks and facilities at New York City, owned by The New York Central Railroad Company, by the New York, New Haven & Hartford Railroad Company for the latter's own business and on a rental basis, or the use of the Union Station at Cleveland (see *Pittsburgh & W. Railway Co.* v. *U. S.*, 41 F. (2d) 806, aff'd 281 U. S. 479). The essential characteristic of the use of terminal facilities contemplated by Sec. 3, Par. 4, is the use of the terminal facilities of one carrier by another *for the latter's own business* for which use compensation and terms are evidently proper.

Plainly the intent of Par. (4) was not to authorize one carrier to impose terms on another as a condition of doing business with that other as a connecting carrier in interstate commerce. That situation is controlled by Par. (3), which requires all carriers to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines."

We believe our view of the scope of Par. (4) is fully borne out by an examination of its provisions upon which the following features are noted.

1. The power of the commission is limited to such cases of the required use of the facilities of one carrier by another as is practicable "without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle *its own business.*"

The implication is plain that the required use is to be one which would be likely to interfere with the full use of such carrier's facilities for its own business, *i.e.*, a use of those facilities by another for the business of that other.

2. The compensation to be fixed by the commission is "to be ascertained on the principle controlling compensation in condemnation proceedings".

Such compensation surely is to be paid for the use of the property of one, by another, for the sole benefit of that other. Clearly such compensation could not be awarded for the privilege of doing business with, or interchanging traffic with, the carrier owning or enjoying the use of terminal facilities.

3. It is provided that "such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced".

It is clear that such a provision could only be applicable to compensation in the nature of a rent and is totally inap-

plicable to facilities for interchange of traffic for the mutual benefit of the carriers involved.

No such use of the respondent's terminal facilities for the petitioner's business was offered by respondent or accepted by the petitioner in this case. There was only an interchange of traffic whereby business accepted by one carrier for through transportation became the business of the other upon transfer from petitioner's float to respondent's tracks or *vice versa*. No authority is granted to the Interstate Commerce Commission by the act to fix terms or conditions for such interchange. On the contrary, under Par. (3), respondent was obliged to afford all reasonable and proper facilities for such interchange.

Our view of the intent of Par. 4 is further fortified by consideration of its origin and of this court's construction of the provision which this paragraph superseded. The subject-matter of Par. 4 was first dealt with in a final proviso to Par. 3 of the original Interstate Commerce Act of February 4, 1887, Chapter 104, 24 Stat. 379, 380, similar to the present Par. 3 dealing with Interchange of Traffic, as follows:

> "But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

This section was amended by the Transportation Act of February 28, 1920, Chapter 91, Section 405, 41 Stat. 479, the proviso being omitted, and the provisions with respect to the use of terminal facilities of one carrier by another incorporated in a separate section, Par. 4 (U. S. Code Ann., Tit. 49, Chap. 1, Sec. 3, par. 3, p. 195).

The original proviso was construed by this Court in the case of *The Pennsylvania Company* v. *United States*, 236

U. S. 351, where this Court was called upon to consider the validity of orders of the Interstate Commerce Commission with respect to interchange of traffic between The Pennsylvania Company and a connecting carrier at Newcastle, Pennsylvania. This Court held that the proviso was not contravened by the Commission's order requiring the Pennsylvania Company to interchange traffic with its connecting carrier at that point even though the handling of the traffic required a use by the Pennsylvania Company of its terminal facilities. This Court said:

> "In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road, within the inhibition of this clause of section 3. The order gives the Rochester road no right to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots *for purposes of its own.* There is no requirement that the Rochester Company be permitted to store its cars in the yards of the Pennsylvania Company or to make use of its freight houses or other facilities; but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania railroad at the same point." (Italics ours.)
>
> *Pennsylvania Company* v. *U. S.*, 236 U. S. 351, 368-69.

Although the use of terminal facilities contemplated by Par. 4 of the present Act has not been defined by this Court, we submit that the use contemplated is exactly that referred to in the former proviso to section 3 and that the Court's view of the nature of that use, as expressed in the

case of the *Pennsylvania Company, supra,* is applicable. So viewed, no use by the petitioner of respondent's terminal facilities within the meaning of section 4 has been shown by the respondent, or in fact existed. The petitioner did not "run its cars over the terminals" of the Long Island Railroad Company "or use or occupy its stations or depots *for purposes of its own*". The respondent has failed to show that the contract it attempted to impose on the petitioner was one authorized by the provisions of the Act.

We submit, therefore, that the petitioner, not desiring to be bound by the conditions propounded by the respondent, acted properly in ignoring the notice and the conditions which the respondent had no right to propose. An appeal to the Interstate Commerce Commission under par. 4, such as suggested by the Circuit Court of Appeals, would have been inappropriate, for that section was totally inapplicable. We submit that the decision of the State Court in *The Patchogue* and of the District Court below were right in holding that the respondent offered the petitioner only the facilities it was bound to offer and that there was no consideration to support a contract.

On the other hand, it is equally true that the act of the petitioner in sending its float to the respondent's terminal was not voluntary and was consequently of no significance as an indication of its acceptance of the respondent's proposed conditions. As Judge Knox pointed out:

> "The libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 10).

Similarly, *B. & O. R. R. Co.* v. *Long Island R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474, 477.

The cases relied upon by the Circuit Court of Appeals, *Ten Eyck* v. *Director General,* 267 F. 974, and *The Cutchogue,* 10 F. (2d) 671 (R. 16, 19), are quite inapplicable. In each of those cases the respondent offered to furnish a service (towage) which it was not, in any event, bound to furnish. The libellant was a free agent not for any reason required to accept the service offered. The libellant in accepting the respondent's offer in those cases, of course, accepted the offer as made, including the conditions attached. The situation was the same in the case of *Sun Oil Co.* v. *Dalzell Towing Co.,* 55 F. (2d) 63 (cited, R. 16) except that there the service furnished was pilotage.

In those cases the libellant's voluntary act could fairly be regarded as an acceptance of the offer. In this case the respondent was bound to afford facilities for the interchange of traffic and could not lawfully impose conditions; the petitioner's act in sending its float to respondent's terminal for the interchange of traffic was obligatory in the performance of its duty to the public and consequently involuntary and of no significance as an acceptance. The essential elements of a contract, *i. e.,* valid offer, consideration and acceptance were, therefore, totally lacking. We submit that the holding of the Circuit Court of Appeals that the petitioner when it sent its carfloat to the terminal contracted that the Long Island Railroad should be free from liability suffered through the latter's negligence is wrong and should be reversed.

POINT II.

The contract which respondent attempted to impose upon petitioner was in no event a valid contract exonerating respondent from liability for negligent injury to petitioner's carfloat under the circumstances of this case.

The State Court in ruling on the identical defense of the respondent in a case involving another connecting carrier said:

> "Defendant was acting as a common carrier pure and simple, in the service rendered to floats with cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequences of his own or his servants' negligence'. *Mariani Bros., Inc.* v. *Wilson Sons & Co., Ltd.*, 188 App. Div. 617, 620."
>
> *B. & O. R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. (N. Y.) 474, 478 (City Court of the City of New York, decision affirmed Appellate Term —leave to appeal to Appellate Division denied).

Judge Knox in the District Court quoted from and approved the opinion in the case just cited (R. 9). He added:

> "During such reasonable periods of time as the proper and usual facilities of carrying freight to the terminal were on claimant's property, the same were, in the absence of specific agreement to the contrary, entitled to common law protection from the negligent acts of the claimant" (R. 10).

It is the established doctrine of this Court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation.

Santa Fe Railway v. *Grant Bros.*, 228 U. S. 177, 184;
Railroad Company v. *Lockwood*, 17 Wall. 357;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397;
Baltimore & Ohio Rwy. Co. v. *Voight*, 176 U. S. 498, 507;
Knott v. *Botany Mills*, 179 U. S. 69, 71;
The Kensington, 183 U. S. 263, 268.

We submit that the District Court and the State Court were correct in their view of the right of the petitioner to common law protection of its property while dealing with the respondent at its terminal. Petitioner, as a connecting carrier, was dealing with the respondent on the same basis as any other member of the public and had the same rights——

A. T. & S. F. R. R. Co. v. *Denver etc. R. Co.*, 110 U. S. 667, 681.

The carrier's duty to the public includes the obligation of ordinary care towards persons lawfully visiting the carrier's terminal for the purpose of doing business with the carrier.

Bennett v. *R. R. Co.*, 102 U. S. 577;
Illinois Central R. R. Co. v. *Griffin* (C. C. A. 7th), 80 Fed. 278;
Wilson v. *Union Pac. R. R. Co.*, 107 Nebr. 111;
Louisville R. R. Co. v. *Morgan*, 165 Ala. 418;
Toledo, etc. R. W. Co. v. *Grush*, 67 Ill. 262;
Burrow v. *Missouri Pa. R. Co.*, 220 Missouri App. 337;

Certainly any member of the travelling public, having lawful business which requires him to enter or approach the

terminal of a public carrier, is entitled to common law protection against injury by negligent act of the carrier, and a notice posted on the premises notifying the public that the carrier will not be liable for negligent injury to persons visiting its terminal on lawful business would certainly be held ineffective. We submit that this is exactly what the respondent has attempted in this case and what the Circuit Court of Appeals has upheld, and that the attempted contract sought to be imposed by the respondent on the libellant should, in no event, be held valid.

The petitioner for certiorari in *The Sun Oil* case, *supra* (No. 38 October Term, 1932, argument on the writ, November 16, 1932, not yet decided at the printing of this brief), has questioned the validity of the contract exempting the Dalzell Towing Company, Inc. from liability for negligence of a pilot furnished under contract and has pointed out the conflict between the decisions in the Second Circuit and other Circuits as to the validity of similar contracts in towage cases, such as *Ten Eyck* v. *Director General* and *The Cutchogue, supra,* based on varying interpretations of the decisions of this Court in *The Steamer Syracuse*, 12 Wall. 167, and *Compania de Navegacion* v. *Fireman's Fund Insurance Company* (*The Wash Gray*), 277 U. S. 66.

The contracts under consideration in those cases were not the contracts of common carriers as this Court has held that a tower is not a common carrier. *The Syracuse,* 12 Wall. 167, 171; *The White City,* 285 U. S. 195, 200. Although the contract in the case of *The Cutchogue* was made by the Long Island Railroad Company, it was a contract for towage which was entirely outside of the scope of that Company's functions as a common carrier.

If this Court should decide that the contracts in those cases were not valid, *a fortiori,* the contract which the

respondent sought to impose on the petitioner in this case which related directly to the liability of the respondent in performing its functions as a common carrier of freight in interstate commerce would be invalid. On the other hand, we submit that irrespective of this Court's decision as to the validity of the contract in *The Sun Oil* case, the contract which the respondent, Long Island Railroad Company, sought in this case must be held invalid under the decisions of this Court holding that common carriers cannot secure immunity from liability for their negligence in the performance of their duties as common carriers by any sort of stipulation.

> *Santa Fe Railway Co.* v. *Grant Brothers*, 228 U. S. 177, 184.

The respondent relies on the last named case as justifying the alleged contract in this case because of this Court's holding there that—

> "there may be special engagements which are not embraced within its duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation" (p. 185).

In that case a contract was made between a railroad company and a construction company for construction of a spur line. A provision of the contract exempted the railroad company from liability for negligence in transportation of property of the construction company to and from the works at a very low rate. This Court held that the railroad company was not acting as a common carrier in contracting for the building of its extensions and branches (p. 186). The Court said:

> "If the railroad company did the work directly it

> would have to take its employees and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree" (p. 187).

Clearly such an agreement is entirely outside the scope of the normal business of transportation of the carrier. Not only has the company a good consideration to offer for such exemption in the reduced rate for transportation as in the cases where free transportation is furnished on passes, but the considerations of public policy which have led to the banning of contracts exempting the carrier from liability for negligence in the performance of its functions as a common carrier are not applicable (see p. 188).

The case of *Central Railroad Company of N. J.* v. *Anchor Line, Ltd.*, 219 Fed. 716 (also cited by the Circuit Court of Appeals, R. 18), deals only with the question of allocation of charges for demurrage as between a railroad company and ocean carrier and the applicability of published tariff charges of the railroad to the ocean carrier under the circumstances of that case.

We submit that the alleged agreement exempting the respondent from liability for negligence in the performance of its duty as a common carrier can in no event be justified in view of the decisions of this Court establishing the principle that such contracts are in conflict with public policy and invalid.

POINT III.

Even if it is held that there was a valid contract that contract should not be construed to release the respondent from liability under the circumstances of this case.

The notice claiming exemption from liability was prepared and issued by the respondent. The contract having been prepared by the respondent and the burden resting on the respondent to establish a lawful contract exempting the respondent from liability, that notice must be construed most strictly against the respondent and the respondent should not be exempted from liability for damage fron negligence unless such is clearly within the provisions of the notice:

> *Baltimore & Ohio R. R. Co.* v. *Long Island R. R. Co.*, 126 Misc. N. Y. 474, 478;
> *American Surety Co.* v. *Pauly* (No. 1), 170 U. S. 133, 144;
> *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, 279.

This rule was quite evidently followed by this court in in the towage cases.

> *The Syracuse*, 12 Wall. 167;
> *Compania de Navegacion* v. *Fireman's Fund Insurance Co.* (*The Wash Gray*), 277 U. S. 66.

We submit that this notice should be construed to be limited to carfloats "lying at Long Island Railroad Company terminals" beyond "such reasonable periods of time", in the language of Judge Knox (R. 10), as required for the interchange of traffic. We submit that a distinction can and should be drawn between floats moored in the float bridge for interchange of freight, and floats lying at

the terminal beyond such reasonable periods of time as required for that purpose.

The respondent itself makes this distinction. In the brief in opposition to petition for writ of certiorari (p. 12) the respondent bases its argument that there was a valid consideration to support the alleged contract on the following statement:

> "Whether or not respondent was obligated to accept petitioner's float is beside the point. Respondent was not obligated to let petitioner's float *lie* at its terminal upon *any terms*. It could have insisted that petitioner maintain a tug to handle its own floats and tow them away as soon as loaded or unloaded. On the other hand, if petitioner objected to allowing its equipment to lie at respondent's terminal upon the terms set forth in the notice, petitioner could have made arrangements to tow such equipment away as soon as loaded or discharged."

The respondent has not shown that the petitioner's float lay at the terminal beyond the reasonable period of time required for the interchange of traffic. If such consideration is required to support respondent's alleged contract, the respondent has failed to show it. On the contrary the fair implication of the stipulation of facts is that the float was actively engaged in the business for which it was sent to the terminal at the time the damage was inflicted. As thus interpreted, the notice has not been shown to be applicable to the damage sustained by the petitioner in this case and should not be sustained as a defense.

Moreover, even if it is considered that the petitioner was making use of the terminal facilities of the respondent at the time of this accident, the injury to petitioner's carfloat was in no way related to or occasioned by that use. It was merely a circumstance that the float was lying in

the float bridge when injured by the respondent through negligence in the operation of other floating equipment. At least, we submit that the contract should be limited to the normal risks of operation of such float.

CONCLUSION.

We submit that no valid contract exempting the respondent from liability under the circumstances of this case has been shown; that the decision of the Circuit Court of Appeals is wrong and should be reversed; and that the interlocutory decree of the District Court reinstated.

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.

Appendix.

EXTRACTS FROM INTERSTATE COMMERCE ACT, U. S. CODE, TIT. 49, CHAP. 1, SEC. 3, PARS. 3 & 4.

(3) INTERCHANGE OF TRAFFIC. All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

(4) TERMINAL FACILITIES; USE OF AND COMPENSATION FOR. If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation procedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other

carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be. (Feb. 4, 1887, c. 104, §3, 24 Stat. 380; Feb. 28, 1920, c. 91, §405, 41 Stat. 479.)

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1932—No. 286.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

—against—

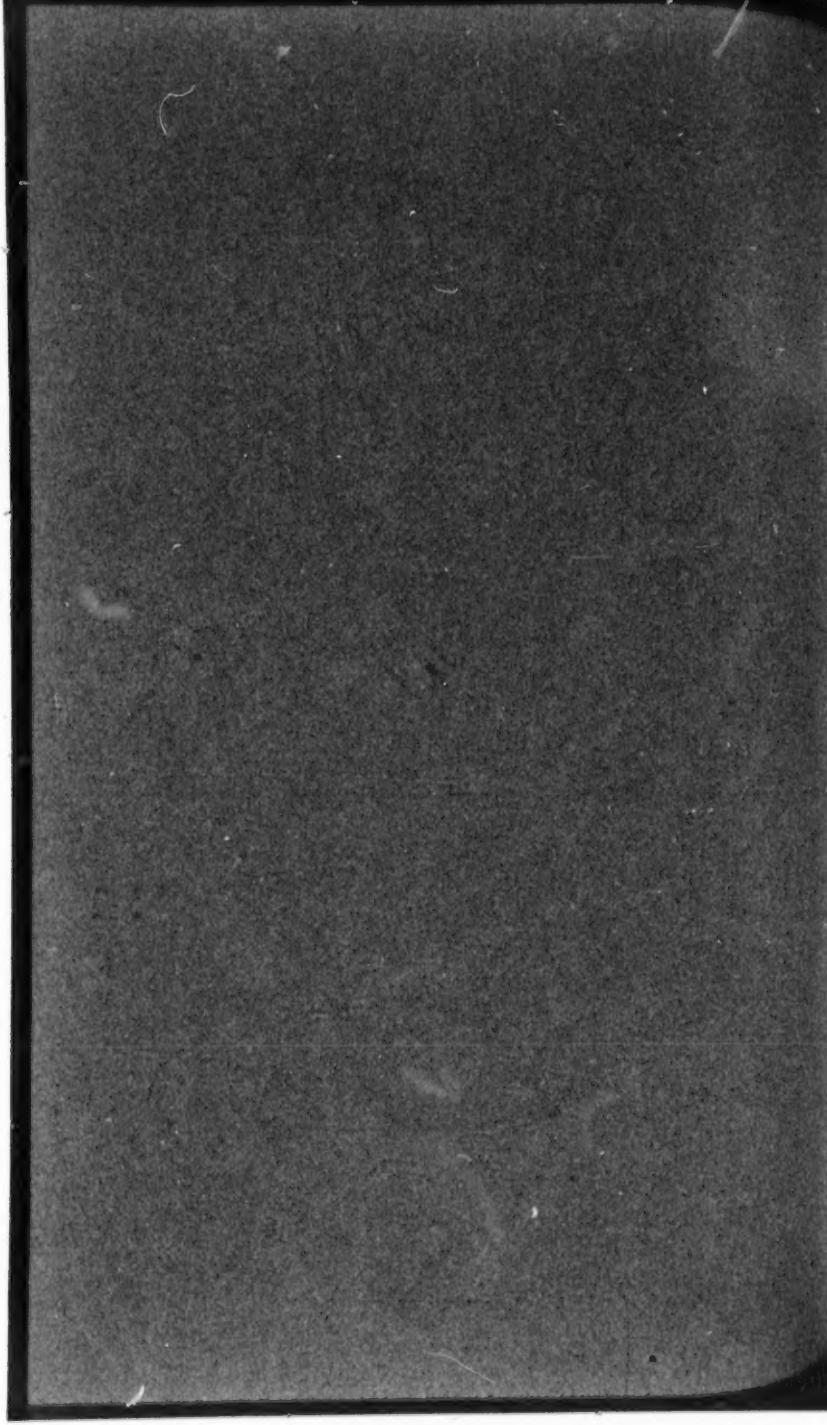
Steamtug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.



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Respondent.

REPLY BRIEF FOR PETITIONER.

Since petitioner's brief was filed this court has rendered its decision affirming the decree of the Circuit Court of Appeals in the case of *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, No. 38, decided December 5, 1932.

As pointed out in petitioner's principal brief (pp. 17 and 18), the decision of this Court that there was a valid contract in that case giving an exemption from liability for the negligence of a pilot furnished in connection with a contract for towage is not a precedent for holding that there was a valid contract in this case, although if that contract had been held invalid, *a fortiori* the contention that there was a valid contract in this case could not have been supported.

The respondent apparently agrees with this position, for Sixth Point of respondent's brief bears the heading "The Towage And Pilotage Cases Are Not In Point" and the *Sun Oil* case is cited as a typical case (Respondent's Brief, p. 20).

The respondent's brief does not meet petitioner's argument that there was no "use" of respondent's "terminal

facilities" by the petitioner within the meaning of Sec. 3, Par. 4 of the Interstate Commerce Act, as amended, under the circumstances of this case, and ignores the apparently controlling authority to this effect—*Pennsylvania Company v. U. S.*, 236 U. S. 351, 368-69.

Respondent argues that

> "even if the situation came under paragraph 3, respondent was not precluded by any controlling principle of law from stipulating against liability for its own negligence" (Respondent's Brief, p. 11)

and suggests many details which might have been considered and taken care of, in any general agreement controlling the relations of these connecting carriers in their interchange of freight. If the parties had entered into such a general agreement and had included such a provision as here sought to be established, a quite different question would be presented. But that is not the question in this case.

The question here is whether the Long Island Railroad Company, having established its terminal, with float bridges at which carfloats may be moored while delivering or receiving freight cars and freight, pursuant to its obligation under Par. 3, Sec. 3 of the Interstate Commerce Act as amended to

> "afford all reasonable, proper and equal facilities for the interchange of traffic",

can by unilateral notice impose, as a condition of the use of such facilities for such interchange, a contract exempting that company from liability for its negligence not only in the ordinary handling of the float but, as in this case, in the handling of other equipment.

We submit that the petitioner in sending its carfloat to the terminal for the purpose of receiving or delivering freight there is entitled to the same common-law protection as any other member of the public from the negligent acts

of the claimant. The attempt of The Long Island Railroad Company to impose such a condition on the petitioner approaching its premises to do business is a violation both of its duty to the public and of its duty to a connecting carrier under Par. 3, Sec. 3 of the Interstate Commerce Act and is of no effect.

This Court has held that a connecting carrier must do business with another on the same basis as any other member of the public.

Atchison T. & S. R. R. Co. v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667.

Although the decision in that case was that the connecting carrier has no greater rights than a member of the general public, we submit that on similar principles its right to do business with the connecting carrier should be no less.

Although the respondent frequently refers to the "use of respondent's terminal facilities" by the petitioner, that use was only such use as any member of the public would make in approaching respondent's terminal for the transaction of business with the respondent. In our principal brief we have used the analogy of an individual or a public drayman approaching the loading platform of any of respondent's freight stations for the purpose of receiving or delivering freight. Other analogies would be a private car or a taxicab delivering a passenger at a passenger station, or an individual entering the carrier's passenger or freight stations for the purpose of transacting any legitimate business with the carrier.

Petitioner did not enter upon respondent's premises or place cars upon its tracks. Petitioner merely placed its carfloat at the floatbridge so that an interchange of traffic might be made.

This Court in the *Sun Oil Co.* case, said:

"Respondent had no exclusive privilege or

> monopoly in respect of the services that petitioner desired to have performed for its tanker."

In these words this Court pointed out a vital distinction between that case and this. The Long Island Railroad did have a monopoly and as pointed out in State Court decision which the Circuit Court of Appeals ignored (quoted by Judge Knox, R. 9):

> "Plaintiff, willy nilly in the instant case, had to deal with defendant at its terminal."
>
> *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474.

We submit that to permit the respondent under such circumstances to impose such unreasonable terms as a condition of doing business with respondent at its terminal would be to create a most dangerous and far reaching precedent.

The respondent has cited the case of

> *Oregon Short Line & Un. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465, aff'd 61 Fed. 158 (C. C. A. 9th).

That case dealt with the question of whether one connecting carrier could insist on freight being received by the other in the cars in which it was already loaded. No such question arises in this case. It does not appear in this record whether The Long Island Railroad Company intended to remove cars from petitioner's float or place cars thereon, or remove from, or deliver to, cars on board the float such freight as was to be received or delivered. There appears here only the simple case of a carfloat approaching respondent's terminal for the purpose of exchanging freight in interstate commerce and making use only of the facilities of interchange which the respondent was required by the Statute to furnish.

It is again asserted in respondent's brief,

> "nor is any contention made that it (the notice) was not assented to" (Respondent's Brief, p. 17).

The contrary is the fact. We emphatically contend that the notice was not assented to. The respondent's counsel evidently refers to the fact that the petitioner did not reply to the notice, choosing to ignore the same as being invalid and of no legal effect.

We submit that the respondent could not by such a notice force the libellant to go to the expense of an appeal to the Interstate Commerce Commission and that under such circumstances as here presented the petitioner should not be penalized because of any possibility of a difference of opinion as to whether such an appeal was necessary.

It is suggested in petitioner's brief that:

> "The case involves solely the custody or handling of equipment belonging to one common carrier and temporarily in the possession of the other common carrier."

We dispute this statement emphatically. It does not appear in this record that the petitioner's carfloat was in the custody of, or handled by, the equipment of "the other common carrier", *i. e.,* the respondent. It appears only that the petitioner's float was "lying moored in Bridge No. 6" (R. 6) and had been received there "in connection with transportation in interstate commerce of freight cars and freight" (R. 7). There is no element of bailment involved in this case.

Respondent's brief (p. 7) again draws a distinction between the use of the terminal "for an interchange of traffic" and the use of the terminal "for a mooring place until towed away". Respondent thus again supports the validity

of the distinction made in Point III of the petitioner's brief (p. 20) and in Judge Knox's opinion (R. 10). There is no doubt a sound basis in fact for such a distinction, for carfloats occasionally lie at other parts of this terminal for indefinite periods after their business has been transacted and until they can be conveniently removed. This fact is developed in the case of *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2) on which respondent relies (Respondent's Brief, pp. 16-17, 19).

We reiterate that at most the effect of respondent's notice should be limited to carfloats while "lying at Long Island Railroad Company terminals" beyond "such reasonable periods of time" (R. 10), as required for the interchange of traffic. In establishing the affirmative defense on which the respondent relies, the burden of proof is undoubtedly on the respondent to establish that the liability in this case falls within the alleged contract. If there is any ambiguity such as suggested by the respondent (Respondent's Brief, p. 7), the respondent must fail.

We submit that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

CLIVE C. HANDY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 286

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

STEAMTUG TALISMAN,
THE LONG ISLAND RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHAUNCEY I. CLARK,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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THE NATURE OF THE CASE

On October 29, 1926, respondent's steamtug *Talisman* with carfloat *No. 58* in tow, came into collision with petitioner's carfloat *No. 37*, which was lying moored at respondent's Long Island City terminal, resulting in damage to *No. 37* (R. 12).

It was agreed between the parties that the collision was occasioned by negligence of tug *Talisman* and that petitioner and respondent were, at the time of the accident, common carriers engaged in interstate commerce.

It is conceded that petitioner duly received by registered

mail from respondent a notice dated July 31, 1920, and that petitioner made no reply thereto. The notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn; All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

"This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn" (R. 12-14).

Respondent's defense to the suit is based on the notice set forth above, the validity of which is the only question in this case.

District Court Opinion

The District Court held that the notice was not a valid defense, relying upon the decision of the City Court of the City of New York in *B. & O. Railroad Co.* v. *Long Island Railroad Co.* (the *Patchogue*), 126 Misc. 474, where the Court said:

"Unlike the towage cases, there was no freedom of contract. Plaintiff, willy-nilly in the instant case had to deal with the defendant at its terminal. Defendant was acting as a common carrier pure and simple, and the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequence of his own or his servants' negligence' (citing case)" (pp. 477-8).

The District Court accepted the above reasoning, saying:

"While this decision (*B. & O. Ry.* vs. *Long Island*) is not binding here, it is very apt, and is entitled to respectful consideration * * *. Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 17-18).

The District Court opinion is reported at 52 F. (2d) 691.

Circuit Court of Appeals Opinion

The Circuit Court of Appeals reversed the decision of the District Court and sustained the validity of the notice as a defense on the ground that it constituted a valid contract binding on petitioner, holding that the notice gave the terms upon which respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there without objecting to the terms of the notice, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 31). The Court held also that such an agreement was authorized under Section 3 of the Interstate Commerce Act authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal" facilities to any other carrier on such terms and for such compensation as the carriers may agree upon or as the Commission may fix as just and reasonable (R. 31). The opinion of the Circuit Court of Appeals is reported at 57 F. (2d) 144.

The Question Presented

The only question presented is whether respondent's notice of July 31, 1920, set forth at page 2 of this brief (R. 13-14) is a valid defense.

Counsel for petitioner assert that there is another question which may be paraphrased as follows: Can a carrier engaged in interstate commerce and maintaining a terminal including float bridges, *exclude* from its terminal, carfloats of a connecting carrier (Petition, p. 5). They argue that

"The decision (below) presupposes that the Long Island Railroad had a right to state 'terms' on which it would agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to *exclude* the New York Central carfloat from its terminal unless the conditions were accepted" (Petition, pp. 5-6).

Clearly the Long Island Railroad Company can impose terms. The Interstate Commerce Act, Section 3, Paragraphs 3 and 4, expressly provides for the use of any terminal owned by one carrier and used by another

"on such terms and for such compensation as the carriers affected may agree upon, * * *" (see Appendix A, Section 3, Paragraph 4).

The Circuit Court of Appeals so held (R. 33).

But there has been no attempt to "exclude" petitioner from the use of respondent's terminal unless conditions were accepted. The imposition of conditions does not constitute exclusion. If the conditions were not acceded to (as they were), petitioner had the right to review by the Interstate Commerce Commission. The Circuit Court of Appeals so held (R. 33).

POINT I

THE AGREEMENT WAS AUTHORIZED BY THE INTERSTATE COMMERCE ACT, SECTION 3, PARAGRAPHS 3 AND 4.

The Interstate Commerce Act, Section 3, Paragraphs 3 and 4,* contain regulations requiring connecting carriers to afford terminal facilities to one another. These paragraphs expressly provide for the use of any terminal owned by one carrier and used by another

"on such terms and for such compensation as the carriers affected may agree upon * * *."

In *Pittsburgh & W. V. Ry. Co.* v. *United States,* 41 F. (2d) 806 (decided in the Northern District of Ohio by a Court of two circuit judges and one district judge) construing this paragraph, the Court said:

"We are of opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and *empowers the railroads to agree upon terms which are just and reasonable,* taking into consideration the financial condition of the contracting parties, the ability to pay, the use required, and all other surrounding circumstances" (p. 810) (italics ours).

Counsel for petitioner contend that the provisions of the Interstate Commerce Act do not apply to the instant case. They argue that

"The New York Central in sending its float to the Long Island Terminal was *not* making use of the terminal facilities of the Long Island Railroad *for its own business,* but was sending its float to the terminal for the interchange of traffic

*Printed in Appendix A attached to this brief.

in interstate commerce for which purpose the Long Island was bound to afford 'reasonable and proper facilities'" (Petition, p. 7).

We find no basis for the above statement. Clearly petitioner's carfloat went to the Long Island Railroad terminal to deliver freight. If this is not petitioner's business, we are at a loss to know what its business is. It seems too fantastic for argument to say that such work was *not* petitioner's business.

Counsel for petitioner contend also that even if it is considered that petitioner was making use of the terminal facilities of the respondent at the time of this accident,

"The petitioner's float was lawfully in the float bridge and the rules governing respondent's liability should be no different than if the collision had occurred while the float was in mid-river" (Petition, p. 11).

Not at all! The rules governing a collision in mid-river are entirely different. In the first place, if petitioner's float were in mid-river it would not be a moored vessel, but it would be *in tow*. Liability would then depend upon the fault of the tug which had the float in tow, as well as the other vessel with which the float collided. A more different situation can hardly be imagined.

Counsel for petitioner contend also that the decision below impliedly recognizes the right of a carrier

"to refuse to afford reasonable facilities for the interchange of traffic with its connecting carrier except upon its proposed terms, and of the connecting carrier to refuse to interchange traffic unless such terms are withdrawn, * * *" (Petition, p. 12).

No such implication is contained in the decision below. There was no refusal by respondent to interchange traffic with petitioner, nor was there any refusal by petitioner to

interchange traffic with respondent. This alleged implication is entirely outside of the case. The decision below holds merely that if petitioner objected to the terms imposed by respondent governing the use of its terminal (and no objection was made), petitioner had a right to apply to the Interstate Commerce Commission for a review of the terms (which it did not do).

As the Circuit Court of Appeals said:

"Under Interstate Commerce Act, § 3, par. 49 U. S. C. A. § 3(3), carriers engaged in the transportation of passengers or property must afford reasonable facilities for the interchange of traffic between their respective lines. Under section 3, par. 4, 49 U. S. C. A. § 3(4), 'if the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, * * * on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings' (R. 32).

"The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been 'satisfied to leave them to the Interstate Commerce Commission and the common law'" (R. 33).

Counsel for petitioner even argue that the decision below "assumes" that petitioner

"could decline to send its carfloat to that terminal if it was dissatisfied with the terms" (Petition, p. 6).

Of course, in case petitioner was dissatisfied with the terms its recourse was an application to the Interstate Commerce Commission, not a declination to deliver freight at respondent's terminal, as it was bound to do.

POINT II

RESPONDENT WAS RELIEVED OF LIABILITY FOR DAMAGE TO PETITIONER'S FLOAT BY ITS NOTICE OF JULY 31, 1920.

No question is raised as to the receipt of the notice, nor is any contention made that it was not assented to (Stipulation, R. 13).

It is well settled that a railroad company may relieve itself from liability (to persons other than shippers and passengers) for damage done by its tugs through negligence, and that no question of public policy is involved. The validity of such contracts has been sustained and the method of making them by a notice similar to that in the case at bar has been approved both by the Circuit Court of Appeals for the Second Circuit and the Court of Appeals of the State of New York.

In *Ten Eyck* v. *Director General,* 267 Fed. 974 (C. C. A. 2), certiorari denied, 254 U. S. 646, the Court said that except as to those toward whom a carrier stands in the position of common carrier (passengers and shippers),

"* * * no reason of public policy forbids such carrier from stipulating against its own negligence and making it a part of the contract (p. 976).

"Notice imposing the conditions under which the tug would be accepted having been received, the railroad company was justified in accepting the towage contract, fully understanding that the libellant agreed to these terms. The terms stated in the notice, therefore, became part of the oral contract entered into for the service" (p. 977).

In *The Cutchogue*, 10 F. (2d) 671 (C. C. A. 2), certiorari denied, 273 U. S. 703, this identical notice was in controversy involving damage to a carfloat at the same terminal. The sending of the notice and the practice of handling floats at the terminal were fully discussed and the conditions of the notice upheld and the Long Island Railroad tug exonerated. The Court said:

"It appears that unbridging was regularly done by the Lehigh Valley Railroad tug, when one happened to be present, but the record does not disclose that there was one present on this occasion. The fact that the service was free does not affect the situation between the parties. The letters made no distinction between free service and that which is paid for. Where service of the bailee or carrier is free, the courts have recognized and imposed conditions exonerating them from liability for carriage. *B. & O. Ry.* v. *Voight*, 20 S. Ct. 385, 176 U. S. 498, 44 L. Ed. 560. The use of the appellee's tug for shifting the appellant's float invoked the condition stated by the owner, and they are binding upon the parties" (p. 673).

In *Graves* v. *Davis*, 235 N. Y. 315, the New York Court of Appeals said:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.*, 2 N. Y. 204; *The Margaret*, 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

See also,

Owen McCaffrey's Sons v. *Director General*, 282 Fed. 728 (S. D. N. Y.);

McCormick v. *Shippy*, 124 Fed. 48 (C. C. A. 2);

Long v. *Lehigh Valley R. Co.*, 130 Fed. 870 (C. C. A. 2).

At the time of the accident in the instant case, petitioner was making use of respondent's facilities in two ways. First, petitioner's float, *No. 58* was being shifted by respondent's tug *Talisman;* second, petitioner's float *No. 37* was lying moored at respondent's terminal. In availing itself of these facilities petitioner did so under the terms of the notice which it admittedly received and impliedly assented to and there is no reason why those terms and conditions should not be enforced.

The Court below so held, saying:

"Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon 'terms' for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the 'terms' indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence" (R. 32).

Counsel for petitioner are mistaken in saying:

"Petitioner in dealing with respondent as a connecting carrier was in the same position as any other member of the public dealing with a common carrier" (Petition, p. 10).

Whatever may be the limitations upon a carrier's right to contract while serving the public, *i. e.,* shippers and passengers, no such limitation exists as between connecting carriers. A connecting carrier is in no sense a part of the public as that word is used in defining the obligation of common carriers. As against shippers and passengers, public policy often forbids the carrier from exempting itself from negligence, but this principle does not apply to the dealings between connecting carriers which are deemed equals, neither of which is entitled to special privileges or protection from the law. They may make whatever contracts they please for the division of responsibility or risk as between themselves.

In *Santa Fe Railway Co.* v. *Grant Bros.*, 228 U. S. 177, this Court said:

"It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation" (p. 185).

In *Central R.* v. *Anchor Line,* 219 Fed. 716 (C. C. A. 2), the Court said:

"The interstate commerce law is not intended for the benefit of carriers, but to protect passengers, shippers and consignees * * *."

"Indeed, as between the carriers, there is no public policy as to which of them should bear any particular charge" (p. 718).

See also *Pittsburgh & W. V. Ry. Co.* v. *U. S.,* 41 F. (2d) 806, 810, referred to above under Point I.

It is clear both from the Act and the decisions that carriers jointly using a terminal are not only permitted but expected to make agreements regarding such use. In the instant case the terms of the notice were part of the agreement under which petitioner used respondent's terminal. The Court below accordingly treated the situation as one involving the relation of one connecting carrier to another, as distinguished from the relation between a common carrier and a shipper or passenger, and held that the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not apply to connecting carriers, saying:

"The distinction drawn by the trial court relied on the fact that the New York Central was obliged to go to the terminal and the Long Island Railroad Company was obliged to re-

ceive the New York Central float and to furnish it terminal facilities. The claimant, therefore, was thought to be in a position similar to that of a common carrier dealing with a passenger or shipper of freight. But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.), 219 F. 716" (R. 32).

POINT III

THERE WAS VALID CONSIDERATION UPON WHICH TO BASE A CONTRACT BETWEEN PETITIONER AND RESPONDENT.

Counsel for petitioner contend that respondent

"had no consideration to offer for such a contract and the act of petitioner in sending its float is shorn of any significance as an acceptance of the respondent's 'terms' for petitioner's act was not voluntary, but an obligatory part of its public duty" (Petition, p. 8).

Whether or not respondent was obligated to accept petitioner's float is beside the point. Respondent was not obligated to let petitioner's float *lie* at its terminal upon *any terms*. It could have insisted that petitioner maintain a tug to handle its own floats and tow them away as soon as loaded or unloaded. On the other hand, if petitioner objected to allowing its equipment to lie at respondent's terminal upon the terms set forth in the notice, petitioner could have made arrangements to tow such equipment away as soon as loaded or discharged. As said in *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2):

"Under the prevailing practice, it can be found that the appellant expected one of the appellee's tugs to perform this

service. While no formal orders for the operation of shifting the float were given, still it must be deemed to have been understood that this work was necessary as a routine in the business and the owner's tacit assent to the conditions may be implied. Undoubtedly the appellant had its choice as to whose tug should do the work. It may have been inconvenient, and perhaps an unnecessary expense, to have its tug at the Long Island Terminal for such use. Appellee was not bound to furnish a tug for bridging or unbridging the float. *Penn. R. Co.* v. *McGirr's Sons Co.* (C. C. A.) 287 F. 334. It did so without compensation (p. 673).

If petitioner had refused to agree to the terms proposed, it could have appealed to the Interstate Commerce Commission. Instead, it acceded to the terms and gave up that right. There is nothing in the record indicating that the terms were not freely agreed upon by the two carriers, though they would have been open to revision if petitioner had declined to accede to the arrangement. As the Court below said:

"It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon *any terms*, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the 'terms' were not freely agreed upon by the two carriers, though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved" (R. 33).

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the

terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 33).

POINT IV

The Authorities.

The only decision cited by counsel for petitioner which is opposed to that of the Court below is *The Patchogue* (*B. & O. R. R. Co.* v. *L. I. R. R. Co.*), 126 Misc. 474, by the City Court of the City of New York, which was affirmed by the Appellate Term without opinion, and leave to appeal to the Appellate Division was denied.

Counsel for petitioner assert also that the decision below is in conflict with the decisions of this Court in *The Syracuse*, 12 Wall. 167, and *Compania de Navegacion* v. *Ins. Co.* (*Wash Gray*), 277 U. S. 66, and with the decisions of the Federal Courts in other Circuits (Petition, p. 12; Brief, pp. 22-3). They apparently overlook the fact that *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C. C. A. 9), came to this Court (259 U. S. 1).

Supreme Court Cases

We shall refer briefly first to the decisions of this Court.

The Syracuse, 12 Wall. 167 (Petition, p. 12; Brief, p. 22), was a *towage* case where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished

the propulsive power was navigated with ordinary care and skill. As this Court said:

"The receipt for the towage—a printed form—was for towing her 'at the risk of her master and owner;' but it seemed that the canalboat had been made fast, the tow put in motion, and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed" (p. 169).

This Court held that the steamboat was not navigated with ordinary care and skill, and she was held at fault.

In *Compania de Navegacion* v. *Ins. Co.* (*The Wash Gray*), 277 U. S. 66, referred to by counsel for petitioner as a decision which followed *The Syracuse, supra* (Petitioner's Brief, p. 22), the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. *Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

In *British Columbia Co.* v. *Mylroie,* 259 U. S. 1, referred to in the petition and petitioner's brief as *Mylroie* v. *British Columbia Mills Tug & Barge Co.,* 268 Fed. 449 (Petition, p. 9; Brief, p. 22), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecssary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

Decisions in Other Circuits

In support of their assertion that the decision below is in conflict with the decisions of the Federal Courts in other Circuits, petitioner has cited certain cases (Brief, pp. 21-3), which we have classified below, showing that with one exception they are not in point.

Towage Cases

The Somers N. Smith, 120 Fed. 569 (Me.);
The Monarch, 235 Fed. 795 (Fla.);
The Sea Lion, 12 F. (2d) 124 (N. D. Cal.);
United States v. *Norfolk-Berkley Bridge Corp., et al.,* 29 F. (2d) 115 (E. D. Va.);
Calzavaro v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4).*

* In this case the Court refused to pass on the towage clause (Opinion, p. 889).

CONTRA*

The Oceanica, 170 Fed. 893 (C. C. A. 2); certiorari denied, 215 U. S. 599;

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); certiorari denied, 273 U. S. 703.

PILOTAGE CASES

Sun Oil Co. v. *Dalzell Towing Co.,* 55 F. (2d) 53 (C. C. A. 2), No. 38 on the docket of this Court;

The Pacific Maru, 8 F. (2d) 166 (D. C. Ga.), where a much broader clause than the one before this Court was passed upon and upheld following an admirable discussion of the cases, saying:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

SIMPLE CONTRACT CASES

B. & O. R. R. Co. v. *Long Island R. R. Co.* (*The Patchogue,*), 126 Misc. 474, decision of the City Court of the

* It is interesting to note that although counsel for petitioner refer to *The Patchogue* (*B. & O. R. R. Co.* v. *Long Island R. R. Co.*), 126 Misc. 474 a City Court case (Brief, pp. 20, 21), and assert that the decision below is opposed to the *decisions* of the Courts of the State of New York, no reference is made to *Graves* v. *Davis,* 235 N. Y. 315, a decision of the New York Court of Appeals, which is in accord with the decision of the Court below.

City of New York, involving the same notice as that in the instant case;

New York Central R. R. v. *Talisman* (The Carfloat No. 37), 57 F. (2d) 144 (C. C. A. 2), the instant case.

It will be seen that all of the cases referred to are "towage" or "pilotage" cases.* A towage case is one in which a vessel with propelling power takes in tow a vessel without propelling power. A typical towage service is that performed by a tug in towing a barge or a carfloat. A pilotage case is one in which a vessel (such as a tug or steamer), which uses her own propelling power, is *assisted* by a tug or tugs in performing a manœuvre, the pilotage consisting of orders from a pilot who goes on the steamer's bridge and directs the entire manœuvre, helm and engine movements of the steamer, as well as the position and movements of the tug or tugs. The pilot usually comes from one of the tugs, and the "pilotage clause" and the meaning thereof grows out of this relation between the pilot and the moving steamer. The typical pilotage case is in docking and undocking steamships with the assistance of tugs. (See *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, No. 38 on the docket of this Court.)

The instant case is neither towage nor pilotage, but one of simple contract.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated, New York,
September 6, 1932.

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*Except *B. & O. R. R. Co.* v. *Long Island R. R. Co.* (*The Patchogue*), 126 Misc. 474, which involved the same notice as in the instant case.

APPENDIX A

Interstate Commerce Act, Section 3, paragraphs 3 and 4:

"§ 3, par. (3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"§ 3, par. (4) *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, or any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be" (49 U. S. C. A. (§1-15a) pp. 157-8).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 286.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

STEAMTUG TALISMAN,
THE LONG ISLAND RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

CHAUNCEY I. CLARK,
PAUL TISON,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

Steamtug TALISMAN,
THE LONG ISLAND RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

This is a review on writ of certiorari of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, reversing a decision of the District Court for the Southern District of New York and dismissing petitioner's libel against the steamtug *Talisman*, owned by respondent.

The opinion of the District Court was rendered on June 30, 1931, and is printed at pages 8-10 of the record. It is reported in 52 F. (2d) 691.

The opinion of the Circuit Court of Appeals was rendered on April 4, 1932, and will be found at pages 15-19 of the record. It is reported in 57 F. (2d) 144.

II

Statement of the Case

Petitioner is the owner and operator of a float used for transporting railroad cars by water, known as carfloat *No. 37*. Respondent is the owner and operator of steamtug *Talisman*. Respondent also operated a terminal at Long Island City, New York, for the loading and unloading of carfloats (R. 6-7).

On October 29, 1926, respondent's steamtug *Talisman*, with a carfloat in tow, came into collision with petitioner's carfloat *No. 37*, which was lying moored at respondent's Long Island City terminal, resulting in damage to petitioner's carfloat (R. 2, 6).

It was stipulated between the parties that the collision was occasioned by negligence of respondent's tug *Talisman;* that petitioner and respondent were at the time of the accident common carriers engaged in interstate commerce, and that respondent received petitioner's carfloat *No. 37* at respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation, R. 6-7).

It was also stipulated that petitioner duly received by registered mail from respondent a notice dated July 31, 1920, and that petitioner made no reply thereto. The notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Rail-

road Company terminals, Long Island City and Bay Ridge, Brooklyn; All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

"This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn" (R. 7).

Respondent's defense to the suit is based on the notice set forth above, the validity of which is the only question in this case.

District Court Opinion

The District Court held that the notice was not a valid defense, relying upon the decision of the City Court of the City of New York in *B. & O. Railroad Co.* v. *Long Island Railroad Co.* (the *Patchogue*), 126 Misc. 474, where the Court said:

"Plaintiff, willy-nilly in the instant case had to deal with the defendant at its terminal. Defendant was acting as a common carrier pure and simple, and the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequence of his own or his servants' negligence' (citing case)" (pp. 477-8).

The District Court accepted the above reasoning, saying:

"Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to

send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 10).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals in reversing the decision of the District Court and dismissing the libel held that the parties were not in the relationship of a common carrier to a shipper or passenger, but were in the relationship of two connecting carriers, saying:

"But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.) 219 F. 716" (R. 17-18).

The Court further held that petitioner assented to the terms of respondent's notice of July 31, 1920, by not replying thereto or going before the Interstate Commerce Commission, as the Interstate Commerce Act contemplated petitioner might do if dissatisfied (R. 18-19).

III

ARGUMENT

Summary of Argument

We shall argue that:

1. The relationship between the parties was not that of common carrier to shipper, but of one common carrier to another in which each stood on equal footing with regard to the other and the common law rule with regard to contracts against liability for negligence applicable to the first relationship, viz., that of common carrier to shipper, have no application to or bearing on the relationship in the instant case.

2. But for the provisions of Interstate Commerce Act, Sec. 3, pars. 3 and 4, petitioner would have no right to interchange traffic with respondent or to use respondent's terminal except with respondent's consent.

3. Petitioner's remedy in case of dissatisfaction with terms upon which respondent allowed use of its terminal was to appeal to the Interstate Commerce Commission.

4. There was valid consideration.

5. The notice of July 31, 1920, relieved respondent from liability for negligence.

6. The Towage and Pilotage cases are not in point.

FIRST POINT

THE RELATIONSHIP BETWEEN THE PARTIES WAS NOT THAT OF COMMON CARRIER TO SHIPPER OR PASSENGER BUT THAT OF ONE COMMON CARRIER TO ANOTHER IN WHICH NEITHER HAS AN ADVANTAGE AND BOTH ARE TREATED AS EQUALS.

It is important at the outset to state clearly the relationship between the parties. There is a clear cut distinction between the relationship of a common carrier to a shipper or passenger on the one hand and the relationship of one common carrier to another on the other hand. In the instant case both parties were common carriers engaged in interstate commerce (R. 6). Petitioner was not a shipper or a passenger on the line of respondent. Both were engaged in the same business and were dealing with each other in regard to the transaction of that business and with particular reference to the use of respondent's terminal by petitioner. In this situation the parties are treated as equals.

Whatever may be the limitations upon a carrier's right to contract while serving the public, *i. e.*, shippers and passengers, no such limitation exists as between connecting carriers. As against shippers and passengers, public policy often forbids the carrier from exempting itself from negligence, but this principle does not apply to the dealings between connecting carriers which are deemed equals, neither of which is entitled to special privileges or protection from the law. They may make whatever contracts they please for the division of responsibility or risk as between themselves.

In *Central R.* v. *Anchor Line,* 219 Fed. 716 (C. C. A. 2), the Court said:

"The interstate commerce law is not intended for the benefit of carriers, but to protect passengers, shippers and consignees * * *."

"Indeed, as between the carriers, there is no public policy as to which of them should bear any particular charge" (p. 718).

See

Baltimore & Ohio, etc., Ry. v. *Voigt,* 176 U. S. 498;
Wells Fargo & Co. v. *Taylor,* 254 U. S. 175;
Santa Fe Ry. v. *Grant Bros.,* 228 U. S. 177, 185;
Hartford Fire Ins. Co. v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 175 U. S. 91.

As the Court below said:

"But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.) 219 F. 716" (R. 17-18).

The cases, therefore, dealing with the liability of a carrier to a passenger or a shipper have no bearing on the instant case because there is no public policy which precludes respondent from limiting its liability for damage to petitioner's equipment by negligence. We are here concerned with the use by one carrier of the terminal of another. There are two ways in which petitioner's float could be using respondent's terminal, (1) it could be using the terminal for an interchange of traffic, or (2) it could be using the terminal for a mooring place until towed away. Whether or not petitioner's float went to respondent's terminal for the purpose of interchanging traffic or some other purpose, it is clear that it was using respondent's terminal facilities. Neither of the uses enumerated involves the duty of a common carrier to the public, *i. e.,* a shipper or a passenger. Both uses are

entirely outside the concern of the general public; they concern only the parties who are both common carriers it is true, but neither of whom is entitled to any advantage in dealing with the other.

Santa Fe Railway v. *Grant Bros.*, 228 U. S. 177, 184-5.

SECOND POINT

PETITIONER HAD NO RIGHT UNDER THE COMMON LAW TO COMPEL RESPONDENT TO INTERCHANGE TRAFFIC WITH IT OR TO USE RESPONDENT'S TERMINAL. THESE RIGHTS ARE PROVIDED FOR IN INTERSTATE COMMERCE ACT, SEC. 3, PARS. 3 and 4.*

This Court has held that at common law there was no obligation upon one carrier to interchange traffic with another carrier even though there was a physical connection between the two railroads and this doctrine is broad enough to cover the use of the terminal of one carrier by another carrier.

Atchison, T. & S. R. R. Co. v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, 680.

Even after the passage of the Act to Regulate Commerce, which is now the Interestate Commerce Act, the Courts allowed carriers to make their own arrangements with regard to the use of their facilities by other carriers.

In *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465; affirmed 61 Fed. 158 (C. C. A. 9), appeal dismissed 17 S. Ct. 997, 41 L. Ed. 1182, the Court construing section 3 of the Act (now §3, par. 3), said:

"* * * a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities

* Printed in Appendix A attached to this brief.

with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests" (pp. 474-5).

See also:

The Express Cases, 117 U. S. 1;
Kentucky & I. Bridge Co. v. *Louisville & Nashville R. Co.*, 37 Fed. 567, 620.

Paragraph 3 of Section 3 of the Interstate Commerce Act is headed "Interchange of Traffic" and deals with that subject. It provides for the furnishing of "reasonable facilities for the interchange of traffic" and declares that there shall be no discrimination between connecting lines. There is nothing in this section which prohibits carriers from making such agreements or contracts with regard to the interchange of traffic as they see fit. There being no prohibition in the statute against the carriers making such contracts as they see fit, there is certainly no prohibition against one carrier stipulating that it will not be liable for negligent damage to the property of another carrier.

Paragraph 4 of Section 3 is headed "Terminal Facilities; use of and compensation for". It provides for the use of terminal facilities of one carrier by another "on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, * * *". Nothing is to be found in this paragraph which would prevent one carrier stipulating against its liability for damage by negligence to the equipment of another carrier.

In *Pittsburgh & W. V. Ry. Co.* v. *United States,* 41 F. (2d) 806, affirmed, 281 U. S. 479, construing paragraph 4, the Court said:

"We are of opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required, and all other surrounding circumstances" (p. 810).

As the Court below said:

"Under Interstate Commerce Act, § 3, par. 3, 49 U. S. C. A. § 3 (3), carriers engaged in the transportation of passengers [fol. 31] or property must afford reasonable facilities for the interchange of traffic between their respective lines.

* * * * * * *

"Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon 'terms' for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the 'terms' indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence.

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 18).

THIRD POINT

PETITIONER'S REMEDY IN CASE OF DISSATISFACTION WITH RESPONDENT'S TERMS AS STATED IN ITS NOTICE OF JULY 31, 1920, WAS TO APPEAL TO THE INTERSTATE COMMERCE COMMISSION.

There can be no doubt that petitioner was under no obligation to accept the terms offered if it was dissatisfied. However, petitioner remained silent and thus acceded to the terms of the notice.

As the Court below said:

"* * * We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 18-19).

Petitioner now contends that paragraph 4 has no application and that paragraph 3 alone is applicable (Petitioner's Brief, p. 13). The stipulation does not support petitioner's contention. Certainly the stipulation fails to show that the situation comes under paragraph 3. It is equally consistent that it comes under paragraph 4 and, indeed, rather indicates that it does come under paragraph 4.

Even if the situation came under paragraph 3, respondent was not precluded by any controlling principle of law from stipulating against liability for its own negligence, when the question involved is an apportionment of risk between two connecting carriers. Such an apportionment of risk depends upon many different circumstances which may vary greatly.

There are many considerations which go into a determination of use of respondent's terminal and the terms of such use, viz., whether the respondent has room for petitioner's floats; whether petitioner has room and how it handles floats at its own terminal; the dangers of navigation at each terminal; the facilities for handling the different kinds of floats at each terminal, and the complications which may arise in case of respondent taking care of its own business at its terminal if the additional hazard of taking care of petitioner's business is introduced. It could well be that the hazard of allowing floats to lie at respondent's terminal was so great under the conditions in that part of the harbor that respondent insisted that petitioner's floats should lie only at petitioner's terminal, and that where petitioner's floats were sent to and allowed to lie at respondent's terminal it must be upon the terms stated in the notice dated July 31, 1920. All such questions and considerations must enter into the reasons for stating the terms. There is no common law duty in such circumstances, and the question is one purely of contract between the parties or otherwise of a statutory command that the service be accorded upon the terms fixed by public authority.

This would be true even if the question was as to liability at the particular time and place for damage to the property of a shipper being interchanged at the moment between one carrier and the other. At the moment of such interchange there would be countless circumstances which might properly affect a decision as to which of the connecting carriers should share the risk at that moment, and the stipulation throws no light at all on that question.

But this is not a case of liability for property belonging to a shipper and being interchanged between one connecting carrier and another. The case involves solely the custody

or handling of equipment belonging to one common carrier and temporarily in the possession of the other common carrier. When two rail carriers interchange freight on land, the locomotive of one carrier must ordinarily be on the track of the other at the time and place of interchange. Many different circumstances might affect what was reasonable and proper as to which carrier should bear the risk of injury to that equipment at the time of such interchange of equipment. There is no principle of law which prohibits one carrier from stipulating that even in event of its own negligence the other carrier shall be liable for such loss. A great range of possible facts may bear on what is reasonable under such circumstances.

This is even clearer where the case is not one of two connecting tracks of two railroad companies in which event any required interchange must be at or in the immediate vicinity of the point of connection. In the instant case there is a considerable intervening space of water carriage. Presumably the interchange could be at the petitioner's end of the water transportation or at respondent's end and this introduces a still greater choice as to specific place of interchange and as to how the risks should be shared. It certainly cannot be declared as a principle of law independent of due hearing and finding by the Interstate Commerce Commission that under no circumstances can one of the carriers involved stipulate that in event of its own negligence the other carrier shall assume the risk incident to interchange of its own equipment with the other. These are very intricate, practical and technical questions which presumably are adjusted along with countless other practical questions when the equipment of one carrier is temporarily in the possession of another as an incident to interchange of property in connection with the interchange of freight traffic.

There is nothing to indicate that the petitioner had no choice as to any other point at which its equipment could be turned over to respondent for the purpose of effecting an interchange. The instant case may have been a situation where it was more agreeable to both parties to use petitioner's floating equipment for interchange at respondent's terminal than to use respondent's floating equipment for an interchange of shipments at the petitioner's terminal. The sending of petitioner's equipment to respondent's terminal may have been a circumstance acceptable to both carriers and this might explain six years' acquiescence by petitioner in the notice given by respondent.

Even if the stipulation made these points clear, they involve questions of reasonableness and propriety not settled absolutely by any general principle of common law so as to be enforced by the Court but call for hearing and determination by the Interstate Commerce Commission as a tribunal enlightened by experience and aided by the special machinery appropriate for the arriving at a proper conclusion as to reasonableness and propriety. This is further borne out by the procedure in rate cases under the Interstate Commerce Act. The act provides that rates shall be reasonable. The question of reasonableness of a rate is always a question for the Interstate Commerce Commission. So also under paragraph 3 the reasonableness and propriety of facilities for the interchange of traffic is a question for the Commission.

There has been no attempt to "exclude" petitioner's carfloats from the use of respondent's terminal as contended by petitioner (Brief, p. 7). The imposition of conditions does not constitute exclusion. If the conditions were not acceded to (as they were), petitioner had the right to review by the Interstate Commerce Commission. As the Court below said:

"The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If

Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been 'satisfied to leave them to the Interstate Commerce Commission and the common law' " (R. 19).

FOURTH POINT

THERE WAS VALID CONSIDERATION

Petitioner contends that respondent offered petitioner only the facilities it was bound to offer and there was no consideration to support a contract because the act of petitioner in sending its float to respondent's terminal was not voluntary, and was consequently of no significance as an indication of acceptance of respondent's terms (Petitioner's Brief, p. 13).

On the contrary petitioner was not obligated to send its float to respondent's terminal. This was entirely a matter of agreement between the parties. Petitioner could have arranged for the delivery of the cars to respondent at petitioner's terminal, or they could have agreed upon exchanging the cars from petitioner's float at some other point in the harbor, or, for that matter, in the middle of the East River. The arrangement as made was for petitioner's float to be sent to respondent's terminal, and the terms were accepted by petitioner. As the Court below said:

"It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon *any terms*, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the 'terms' were not freely agreed upon by the two carriers,

though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved" (R. 19).

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 18-19).

Or if petitioner objected to the method of handling its equipment at respondent's terminal or to the terms as set forth in respondent's notice, petitioner could have made arrangements to handle its own equipment and tow it away as soon as loaded or discharged. As said in *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2) cert. denied 273 U. S. 703:

"Under the prevailing practice, it can be found that the appellant expected one of the appellee's tugs to perform this service. While no formal orders for the operation of shifting the float were given, still it must be deemed to have been understood that this work was necessary as a routine in the business and the owner's tacit assent to the conditions may be implied. Undoubtedly the appellant had its choice as to whose tug should do the work. It may have been inconvenient, and perhaps an unnecessary expense, to have its tug at the Long Island Terminal for such use. Appellee was not bound to furnish a tug for bridging or unbridging the float. *Penn. R. Co.* v. *McGirr's Sons Co.* (C. C. A.), 287 F. 334. It did so without compensation (p. 673)."

FIFTH POINT

RESPONDENT WAS RELIEVED OF LIABILITY FOR DAMAGE TO PETITIONER'S FLOAT BY ITS NOTICE OF JULY 31, 1920.

No question is raised as to the receipt of the notice, nor is any contention made that it was not assented to (R. 6-7). The method of making the agreement has been recently approved by this court in *Sun Oil Co.* v. *Dalzell Towing Co. Inc.,* No. 38, decided December 5, 1932.

In *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2), certiorari denied, 273 U. S. 703, a similar notice involving liability for negligent towage was in controversy. There, the damage was to a carfloat at the same terminal. The sending of the notice and the practice of handling floats at the terminal were fully discussed and the conditions of the notice upheld and the Long Island Railroad tug exonerated. The Court said:

"It appears that unbridging was regularly done by the Lehigh Valley Railroad tug, when one happened to be present, but the record does not disclose that there was one present on this occasion. The fact that the service was free does not affect the situation between the parties. The letters made no distinction between free service and that which is paid for. Where service of the bailee or carrier is free, the courts have recognized and imposed conditions exonerating them from liability for carriage. *B. & O. Ry.* v. *Voight,* 20 S. Ct. 385, 176 U. S. 498, 44, L. Ed. 560. The use of the appellee's tug for shifting the appellant's float invoked the condition stated by the owner, and they are binding upon the parties" (p. 673).

In *Graves* v. *Davis,* 235 N. Y. 315 (a towage case), the New York Court of Appeals said:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No

rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.*, 2 N. Y. 204; *The Margaret*, 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

In *Ten Eyck* v. *Director General*, 267 Fed. 974 (C. C. A. 2), certiorari denied, 254 U. S. 646 (another towage case), the Court said with reference to the method of imposing terms.

"Notice imposing the conditions under which the tug would be accepted having been received, the railroad company was justified in accepting the towage contract, fully understanding that the libellant agreed to these terms. The terms stated in the notice, therefore, became part of the oral contract entered into for the service" (p. 977).

Petitioner seeks to avoid the effect of the notice by asserting that it is the established doctrine of this Court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation (Petitioner's Brief, p. 15). However, it is apparent from the authorities referred to, that the doctrine is confined to immunity from liability for negligence to the public. But here we are concerned with the obligations between carriers; there is no question of public policy. (See this Brief, Point I.)

SIXTH POINT

THE TOWAGE AND PILOTAGE CASES ARE NOT IN POINT

Petitioners have referred to certain "towage" and "pilotage" cases* which are in point only in so far as some of them are authority for a similar method of making the contract (discussed under Point V).

A "towage" case is one in which a vessel with propelling power draws another without propelling power. A typical towage service is that performed by a tug in towing a barge or a carfloat. Towage has recently been defined by this Court in *Stevens* v. *White City,* 285 U. S. 195, as follows:

"The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is *towage.* Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to *assist* them in moving about harbors and docks. *Benedict on Admiralty,* 5th ed., § 100" (p. 200).

A "pilotage" case is one in which a vessel (such as a steamer) which uses her own propelling power is assisted by a tug or tugs in performing a manœuvre, the pilotage consisting of orders from a pilot, who goes on the steamer's bridge and directs the entire manœuvre, *i. e.,* gives orders for the movement of the helm and engines of the steamer, as well as the position and movements of the assisting tug or

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* TOWAGE CASES

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); certiorari denied, 273 U. S. 703;

Stevens v. *The White City,* 285 U. S. 195 (Petitioner's Brief, p. 17).

PILOTAGE CASES

Sun Oil Co. v. *Dalzell Towing Co.,* 55 F. (2d) 63 (C. C. A. 2), No. 38 on the docket of this Court, decided December 5, 1932 (Petitioner's Brief, pp. 5, 14, 17, 18).

tugs. The pilot usually comes from one of the tugs. A typical pilotage case is in docking and undocking steamships with the assistance of tugs (see *Sun Oil Co.* v. *Dalzell Towing Co.*, No. 38 on the docket of this Court, decided December 5, 1932).

The instant case is neither one of "towage" or pilotage. Petitioner's carfloat, which was damaged, was lying moored at respondent's terminal (R. 2, 6).

The *Syracuse*, 12 Wall. 167 (Petition, p. 12; Brief, pp. 17, 20) was a *towage* case where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill.

"The receipt for the towage—a printed form—was for towing her 'at the risk of her master and owner;' but it seemed that the canalboat had been made fast, the tow put in motion, and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed" (p. 169).

This Court held that the steamboat was not navigated with ordinary care and skill, and she was held at fault.

In *Compania de Navegacion* v. *Ins. Co.* (*The Wash Gray*), 277 U. S. 66 (Petitioner's Brief, pp. 17, 20), the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. *Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who de-

fended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Conclusion

Petitioner attempts to read the common law liability for common carrier transportation into a situation where there is no common carrier transportation by respondent, but a duty which arises and responsibilities which exist by statute, whether the statute is Paragraph 4 of Section 3 of the Interstate Commerce Act, if what is involved is the use of respondent's terminal, or Paragraph 3 of Section 3 of the Act, if what is involved is an interchange of traffic between petitioner and respondent. In neither case does the statute preclude exemption from liability due to negligence. Under either section respondent is free from the prohibition existing at common law upon a common carrier exempting itself from its own negligence in connection with the common carrier function of transportation by the carrier whose negligence is sought to be made a ground for liability.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Chauncey I. Clark,
Paul Tison,
Counsel for Respondent.

Dated New York, December 12, 1932.

APPENDIX A

Interstate Commerce Act, Section 3, paragraphs 3 and 4:

"§ 3, par. (3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"§ 3, par. (4) *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, or any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be" (49 U. S. C. A. (§ 1-15a) pp. 157-8).

SUPREME COURT OF THE UNITED STATES.

No. 286.—October Term, 1932.

The New York Central Railroad Company, as Owner of the Carfloat "No. 37", Petitioner, *vs.* Tug "Talisman", the Long Island Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 6, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

This is a suit in admiralty brought by petitioner in the southern district of New York against the tug Talisman, of which respondent is the owner and claimant, to recover damages to carfloat No. 37 belonging to petitioner. The case was submitted on an agreed statement of facts.

Petitioner and respondent were common carriers engaged in interstate commerce. The damages resulted from a collision October 29, 1926, between petitioner's carfloat No. 58 while in tow of the Talisman and carfloat No. 37 which was moored in a carfloat bridge of respondent's terminal at Long Island City. The collision was occasioned solely by the negligence of the Talisman and those in charge of her. Respondent received No. 37 at the terminal named in connection with the transportation in interstate commerce of freight cars and freight. Petitioner had received by registered mail from respondent a notice dated July 31, 1920.

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn. On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float or craft. This company will not be responsible for any damage received by said floating equipment while lying at

the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes. This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Petitioner had made no reply to the notice.

The district court held respondent liable. 52 F. (2d) 691. The Circuit Court of Appeals reversed. 57 F. (2d) 144.

Petitioner and respondent were connecting carriers. As such, each in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry. *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 324. *Myrick* v. *Michigan Central R. R. Co.*, 107 U. S. 102, 106. *Dunham* v. *Boston & Maine*, 70 Me. 164, 170. *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U. S. 667, 683. *Andrus* v. *Columbia & Okanogan Steamboat Co.*, 47 Wash. 333, 338. Such carriers were not bound under the common law to make track connections. *Wisconsin &c. R'd Co.* v. *Jacobson*, 179 U. S. 287, 296. *A. T. & S. F. Railroad* v. *D. & N. O. Railroad, supra.* The Interstate Commerce Act empowered the commission to require such connections. *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244.

And § 3 (3) provides that all carriers shall, according to their respective powers, "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines". Respondent's terminal and carfloat bridge constituted the place and means long used for such interchange. It is not suggested that, at the time of the collision, petitioner's carfloat was not where respondent intended to have it brought or that petitioner could have selected any other place or means. It was not free elsewhere to tender the traffic. In view of the duty put upon respondent by the policy of the law, it was bound to exercise reasonable care for the safety of petitioner's carfloat while engaged in delivering and receiving traffic. *Bennett* v. *Railroad Co.*, 102 U. S. 577. *Woodruff* v. *Painter & Eldridge*, 150 Pa. 91, 96.

But respondent insists that, if dissatisfied with the terms of the notice it sent, petitioner's remedy was to appeal to the Interstate Commerce Commission for relief under par. (4) of § 3. That

position is not tenable. The place and bridge furnished by respondent for interchange are not terminal facilities within the intention of that paragraph. The expression "terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier" does not include mere interchange facilities. Petitioner's use of respondent's property involved no taking requiring the ascertainment of just compensation as provided in that paragraph. *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 368. Moreover, the requirement in par. (3) that carriers shall furnish "equal" facilities for interchange negatives the suggestion that par. (4) applies.

For the better discharge of their duties, these public servants were required by the Act to cooperate in effecting interchange of traffic. Respondent could not by its own act relieve itself of any duty imposed upon it by law or arising out of the nature of its undertaking in respect of the required interchange. It was powerless by mere announcement to fix the terms on which it would participate with petitioner and other connecting carriers in effecting such interchange. It cites *Sun Oil Co.* v. *Dalzell Towing Co.,* — U. S. —. But the towage company was not bound to render the service there involved and was not a common carrier or liable as such. That case, and the cases cited which arose under contracts for towage, plainly have no application to the question under consideration. Here the respondent's duty to petitioner arose out of the law governing its occupation. Petitioner made no reply to the notice sent it by respondent. In view of the character of respondent's duties, no contract can be implied from petitioner's silence. That quite as reasonably may be deemed to imply, if any implication is to be drawn, that petitioner intended to stand on its rights and not to surrender them. And, as respondent was not in position to dictate terms, petitioner was under no obligation to repudiate those proposed or to reply in any manner to the notice. *New Jersey Steam Navigation Company* v. *Merchants' Bank,* 6 How. 344, 383. *Hollister* v. *Nowlen,* 19 Wend. 234, 242, 246. *York Company* v. *Central Railroad,* 3 Wall. 107, 113. *Railroad Co.* v. *Manufacturing Co., supra,* 329. *Judson* v. *Western Railroad Corporation,* 6 Allen 487, 490-491. *Gott* v. *Dinsmore,* 111 Mass. 45, 52.

Reversed.